Supreme Court of the United States

OCTOBER TERM, 1914.

No. 775

LEO M. FRANK,

Appellant,

against

C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA.

APPELLANT'S ARGUMENT.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,

Appellant's Counsel.

SUBJECT INDEX.

	PAGE
STATEMENT	1-20
The Hostile Atmosphere Surrounding the Trial	3, 4
Demonstrations in the Presence of the Jury and Their Effect	4, 5
The Circumstances Resulting in Appellant's Absence from the Court Room	5-7
Mob Action After the Charge and the Reception of the Verdict	7, 8
Proceedings in the State Court After the Verdict	8-11
Efforts to Review Decision by Writ of Error	11, 12
Appellant's Grounds for Asserting the Nullity of Verdict and Judgment	12-14
Grounds of Denial of Relief by Judge Newman	14, 15
Assignments of Error	15-20
ARGUMENT:	
POINT I. The reception by the Superior Court of Fulton County of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the Court and the nullification of the verdict and judgment	21-81
Statement of Appellant's Position	21-23
The Essential Elements of Due Process	23-31

	PAGE
Hovey *v.* Elliott	24-29
Windsor *v.* McVeigh	29-31
The Right to be Heard	31-40
Scott *v.* McNeal	33, 34
Standard Oil Co. *v.* Missouri	34, 35
Ex parte Riggins	36-40
Further Authorities on the Right to be Heard	40-44
Decisions Probably Relied on by the State	45-64
Hurtado *v.* California	45-48
Allen *v.* Georgia	48, 49
Brown *v.* New Jersey	49, 50
Maxwell *v.* Dow	50, 51
Simon *v.* Craft	51-53
Twining *v.* New Jersey	53-58
Hammond Co. *v.* Arkansas	58-61
Jordan *v.* Massachusetts	61, 62
Garland *v.* Washington	62-64
Appellee's Cases Distinguished	64-66
The Right of the Accused to be Present at Every Stage of His Trial Essential to the Right to be Heard	66-70
The Right of the Accused to be Present at the Reception of the Verdict	70-81
The Georgia Decisions	72-76
The Decisions of this Court	76-81

POINT II. Not only was the appellant deprived of due process of law, because he was by the action of the Court, kept out of the court-room when the verdict was rendered, but the entire proceedings became *coram non judice,* because of mob domination, to which the presiding judge succumbed and which in effect wrought a dissolution of the Court | 82-93

POINT III. The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one

PAGE

which neither he nor his counsel could waive or abjure 94-105
Georgia Decisions 95-99
Decisions of This Court 99-105

POINT IV. It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel 106-108

POINT V. If, therefore, Frank's absence at the reception of the verdict constituted an infraction of due process of law, which could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack the judgment as a nullity 108, 109

POINT VI. Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned, can be raised, then, we contend that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an *ex post facto* law 110-113

POINT VII. It follows from the propositions thus far discussed that appellant's application for a writ of *habeas corpus* is squarely based on the contention that, when the ver-

PAGE

dict against him was received and judgment was rendered against him the Court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making *habeas corpus* the proper remedy to test the validity of his detention thereunder 114-131

POINT VIII. The appellant had, before applying for a writ of *habeas corpus,* exhausted all of his remedies in the State courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this Court has pointed out as controlling in like cases....131-154

POINT IX. Judge Newman entirely misconceived the decisions which led to a denial of a writ of error to review the judgment of the Supreme Court of Georgia, and misapplied them.....154-157

POINT X. In the present case, the Superior Court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings, being nullities, he is entitled to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial under the indictment.....157-165

APPENDIX 167-219

Cases and Authorities Cited.

DECISIONS: PAGE

Allen *v.* Arguimbau (198 U. S. 149) 155
Allen *v.* Georgia (166 U. S. 138) 48, 65
Badgley, *Ex parte* (7 Cowen, 472) 157
Bagwell *v.* State (129 Ga. 170) 74
Bain, *Ex parte* (121 U. S. 1) 119
Baker *v.* Grice (169 U. S. 284) 140
Ball *v.* United States (140 U. S. 118) 78, 103
Barton *v.* State (67 Ga. 653) 74, 95, 105
Blend *v.* People (41 N. Y. 604) 92
Bonner, *In re* (151 U. S. 242) 119, 159
Bonner *v.* State (67 Ga. 510) 74
Bridges, *Ex parte* (2 Woods 428) 124
Brown *v.* New Jersey (175 U. S. 172) 49
Cancemi *v.* People (18 N. Y. 128) 103
Cawthon *v.* State (119 Ga. 395) 75, 96
Central of Ga. Ry. *v.* Wright (207 U. S. 127) .. 40
Chapman, *In re* (156 U. S. 211) 139
Chicago, B. & Q. R. R. Co. *v.* Chicago (166 U. S. 226) 32
Collier *v.* State (115 Ga. 803) 90
Cook *v.* Hart (146 U. S. 183) 137
Crain *v.* United States (162 U. S. 625) 64
Denver *v.* State Inv. Co. (49 Col. 244) 43
Diaz *v.* United States (223 U. S. 456) ..74, 80, 95, 105
Dickinson *v.* United States (159 Fed. Rep. 801) 104
Dowdell *v.* United States (221 U. S. 331) 79
Dunn *v.* Commonwealth (6 Pa. St. 384) 69
Ellerbee *v.* State (75 Misc. 522) 91
Felts *v.* Murphy (201 U. S. 123) 122
Fitts *v.* McGhee (172 U. S. 516) 141
Fonda, *Ex parte* (117 U. S. 516) 135
Frank *v.* State (141 Ga. 243) 9
Frank *v.* State (83 S. E. 645) 148
Frederich, *Ex parte* (149 U. S. 70) 137
French *v.* Barber Asphalt Pav. Co. (181 U. S. 324) 80

PAGE

Garland *v.* Washington (232 U. S. 642) 62
Garr, Scott & Co. *v.* Shannon (223 U. S. 458). 155
Glasgow *v.* Moyer (225 U. S. 420) 143
Hammond Co. *v.* Arkansas (212 U. S. 322) .. 58, 65
Harlan *v.* McGourin (218 U. S. 442) 128
Hayes *v.* Georgia (58 Ga. 35) 92
Hibben *v.* Smith (191 U. S. 310) 80
Hinman *v.* People (13 Hun, 266) 92
Hodges *v.* United States (203 U. S. 1) 36
Hopt *v.* Utah (110 U. S. 579) 77, 99, 102, 111
Hovey *v.* Elliott (167 U. S. 409) 24, 31, 65
Hurtado *v.* California (110 U. S. 516) 45, 64
Jordan *v.* Massachusetts (225 U. S. 167) 61, 65
Kaizo *v.* Henry (211 U. S. 146) 127
Kepner *v.* United States (195 U. S. 100) 102
Lampkin *v.* State (87 Ga. 517) 153
Lewis *v.* United States (146 U. S. 373) 68, 79, 100
Londoner *v.* Denver (210 U. S. 385) 40, 42
Lyons *v.* State (7 Ga. App. 50) 75, 98, 110, 149
McClaughry *v.* Deming (186 U. S. 49) 126
McClure *v.* State (77 Ind. 287) 92
Markuson *v.* Boucher (175 U. S. 184) 142
Massey *v.* State (31 Tex. Cr. Rep. 371) 86
Maurer *v.* People (43 N. Y. 1) 80
Maxwell *v.* Dow (176 U. S. 581) 50, 64
Medley, *In re* (134 U. S. 160) 138, 158
Michaelson *v.* Beemer (72 Neb. 761) 163
Minnesota *v.* Brundage (180 U. S. 409) 142
Muhlker *v.* N. Y. C. & H. R. R. R. Co. (197 U. S. 544) 113
Myers *v.* State (97 Ga. 76) 90
New York *v.* Eno (155 U. S. 89) 139
Nielsen, Matter of Hans (131 U. S. 176) 115
Nolan *v.* State (53 Ga. 137) 73, 110, 146
Nolan *v.* State (55 Ga. 522) 68, 69, 73, 146, 148
Oakley *v.* Aspinwall (3 N. Y. 547) 126
O'Brien *v.* People (17 Col. 561) 92
Ong Chang Wing *v.* United States (218 U. S. 280) 66
Pennoyer *v.* Neff (95 U. S. 714) 92
People *ex rel.* Devoe *v.* Kelly (97 N. Y. 212) .. 162

PAGE

People *v.* Fleming (136 Pac. Rep. 291) 90
People *v.* Shaw (3 Hun, 272) 92
People *v.* Wolf (183 N. Y. 472) 84
Pepke *v.* Cronan (155 U. S. 100) 139
Prine *v.* Commonwealth (18 Pa. St. 103) 68
Rawlins *v.* Mitchell (127 Ga. 24) 111
Rex *v.* Ladsingham (Sir T. Raym. 193) 69
Rhodes *v.* State (128 Ind. 189) 70
Riggins, *Ex parte* (134 Fed. Rep. 404) 36, 91
Riggins *v.* United States (199 U. S. 547) 36
Robson *v.* State (83 Ga. 171) 96
Rogers *v.* Alabama (192 U. S. 226) 130
Rogers *v.* Peck (199 U. S. 425) 123
Royall, *Ex parte* (117 U. S. 241)..... 133
Sanders *v.* State (85 Ind. 319)..... 89
Schwab *v.* Berggren (103 U. S. 442).....78, 100
Scott, *Ex parte* (70 Miss. 247)..... 161
Scott *v.* McNeal (154 U. S. 34)..... 33
Simon *v.* Craft (182 U. S. 427) 51, 65
Slaughter House Cases (16 Wall. 36) 54
Spencer, *Ex parte* (228 U. S. 652) 129, 143
Standard Oil Co. *v.* Missouri (224 U. S. 270) .. 34
State *v.* Welden (91 S. C. 29) 88
Stevens *v.* McClaughry (207 Fed. Rep. 18) ...
128, 145, 147
Temple *v.* Commonwealth (14 Bush, 769)..... 69
Thompson *v.* Utah (170 U. S. 343) 101, 106, 107
Tinsley *v.* Anderson (171 U. S. 101) 141
Twining *v.* New Jersey (211 U. S. 78) 53, 65
United States *v.* Shipp (203 U. S. 563) 93
Urquhart *v.* Brown (205 U. S. 179) 142
Valentina *v.* Mercer (201 U. S. 131) 122, 123
Waters-Pierce Oil Co. *v.* Texas (212 U. S. 112). 155
Windsor *v.* McVeigh (93 U. S. 274) 29, 31
Whitten *v.* Tomlinson (160 U. S. 231) 140
Wood *v.* Brush (140 U. S. 278) 135

TEXT WRITERS:

Bishop's New Cr. Proc., 1913, §§ 265-274..... 72
Cooley's Const. Lim., § 452..... 71
Cyclopedia of U. S. S. C. Rep., Vol. V, 618... 85

PAGE

McGehee on Due Process, pp. 164, 165, 168.... 72
Moore on Facts, Vol. II, §§ 991, 995..... 70

STATUTES:

Act of Congress, Mch. 10, 1908, Ch. 76 (35 St. L., p. 40)..... 15
Code of Georgia, 1873, § 3719..... 152
Code of Georgia, 1882, § 217..... 112
Code of Georgia, 1910, § 5732..... 70
" " " " § 6089..... 152
" " " " § 6207..... 112
" " " " § 6506..... 149
Constitution of Georgia..... 21
Constitution of the United States.....2, 111, 132
Laws of Georgia, Acts of 1858, p. 74..... 112
Penal Code of Georgia, §§ 1036, 1037..... 67
U. S. Revised Statutes, §§ 751-756.....114, 115

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 775.

LEO M. FRANK,
Appellant,

against

C. WHEELER MANGUM, Sheriff of Fulton County, Georgia.

Appellant's Argument.

Leo M. Frank appeals from a judgment rendered on December 21, 1914, by the United States District Court for the Northern District of Georgia, Hon. William T. Newman, United States District Judge, presiding, which denied his petition for a writ of *habeas corpus*. An appeal to this court was allowed by Mr. Justice Lamar, who certified that there was probable cause for such allowance. (*Rec. pp. 16; 229-231.*)

The appellant, in his petition, alleged that he was unjustly and unlawfully deprived of his liberty, and unlawfully imprisoned and detained in the jail of Fulton County, Georgia, by C.

Wheeler Mangum, the Sheriff of the County and ex-officio jailer thereof; that his imprisonment was in violation of his rights as a citizen of the United States, guaranteed by that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law. The petition showed that the sole claim of authority by virtue of which he was restrained of his liberty is, that on May 24, 1913, he was indicted by the grand jury of Fulton County, Georgia, on the charge of having murdered Mary Phagan; that thereafter in the Superior Court of Fulton County, Hon. L. S. Roan, a Judge of that court, presiding, he was arraigned and tried on the indictment, and on August 25, 1913, the jury empanelled to try him returned a verdict of guilty, upon which the judgment of the court was thereafter rendered, and he was, on August 26, 1913, sentenced to be hung, and thereafter remanded to the custody of the respondent as sheriff and ex-officio jailer, and has continued in such custody ever since awaiting the execution. (*Rec. p. 1*).

The petition shows that, at the time of the rendition of the verdict, the entry of judgment thereon, and the pronouncement of the sentence of death against the appellant; the Superior Court of Fulton County, in which he was tried, had lost jurisdiction over him and over the trial of the indictment, and that all proceedings upon the trial, including the reception of the verdict, the rendition of the judgment, and the pronouncement of the sentence of death and his commitment to the jail of Fulton County and into the custody of the respondent, were without due pro-

cess of law, and in all respects null, void and of no effect, and he charges that his imprisonment, confinement and detention are in all respects illegal, and in violation of his constitutional rights. (*Rec. pp. 1, 2.*)

The facts which occasioned such loss of jurisdiction and by reason of which he was deprived of due process of law and of the equal protection of the laws, are stated by the appellant in his petition as follows (*Rec. pp. 2 to 5*):

The Hostile Atmosphere Surrounding the Trial.

"My trial in the Superior Court of Fulton County, State of Georgia, before Hon. L. S. Roan and a jury, began on July 28, 1913, in the Court House at Atlanta, Georgia, and continued until August 25, 1913. The court room in which the trial took place was on the ground floor of the Court House. The windows of the court room were open during the progress of the trial, and looked out on Pryor Street, a public street of Atlanta. An open alley ran from Pryor Street along the side of the Court House, and there were windows looking into this alley from the court room. The noises from the street were thus conveyed to the court room, and the proceedings in the court room could be heard in the street and alley. Considerable public excitement prevailed during the trial, and it was apparent to the Court that public sentiment seemed to be greatly against me. The court room was constantly crowded, and considerable crowds gathered in the street and alley, and the noises which emanated from them could be heard in the court room. These crowds were boisterous. Several times during the trial, the crowd in the court room and outside of the Court House applauded, in a manner audible both to the Court and jury, whenever the State scored a point. The crowds outside

cheered, shouted and hurrahed, while the crowd within the court room evidenced its feelings by applause and other demonstrations. Practically all of the seats in the court room were occupied, both within and without the bar. The aisles at each end of the court room were packed with spectators. The jury, in going to and from the court room, in the morning, at noon and in the evening, were dependent upon the passageways made for them by the officers of the court. The bar of the court room itself was so crowded as to leave but a small space for occupancy by the counsel. The jury box, which was occupied by the jury, was enclosed by the crowd sitting and standing in such close proximity to it that the whispers to the crowd could be heard during a part of the trial.''

Demonstrations in the Presence of the Jury and Their Effect.

''On Saturday, August 23, 1913, during the argument of Solicitor General Dorsey to the jury, Reuben R. Arnold, Esq., one of my counsel, made an objection to such argument, and the crowd laughed at him. While Mr. Arnold, my counsel, made a motion for a mistrial, and was engaged in taking evidence in support thereof before the Court, the crowd applauded a witness who testified that he did not believe that the jury heard the applause of the crowd on the previous day, since at that time the jury was in the jury room about twenty feet distant.''

''On Saturday, August 23, 1913, while the Court was considering whether or not the trial should proceed on that evening and to what hour the trial should be extended, the excitement in and without the court room was so apparent as to cause apprehension in the mind of the Court as to whether the trial could be safely continued on that day, and before deciding upon an adjournment, the presiding Judge, Hon. L. S. Roan, while upon the bench, and in the presence of the jury, conferred

with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment, stationed in Atlanta, who were well known to the jury. The public press of Atlanta, apprehending danger if the trial continued on that day, united in a request to the Court, that the proceedings should not continue on Saturday evening. The trial was thereupon continued until the morning of Monday, August 25, 1913."

"It was evident on that morning, that the public excitement had not subsided, and that it was as intense, as it had been on the Saturday previous. Excited crowds were present as before, both within and outside of the court room. When the Solicitor General entered the court room, he was greeted by applause by the large crowd present, who stamped their feet and clapped their hands, the jury being then in its room, about twenty feet distant."

The Circumstances Resulting in Appellants' Absence from the Court-Room.

"During the entire trial I was in the custody of C. Wheeler Mangum, the Sheriff of Fulton County and ex-officio jailer, and was actually incarcerated in the jail, except on such occasions when I was brought into the court room by the Sheriff or one of his deputies. I was unable to be present at the trial, except when permitted by the Court and conducted there by the said Sheriff or his deputies.

"On the morning of Monday, August 25, 1913, shortly before Hon. L. S. Roan, Presiding Judge, began his charge to the jury, he privately conversed with Messrs. L. Z. Rosser and Reuben R. Arnold, two of my counsel, in the jury room of the Court House, and referred to the probable danger of violence that I would incur if I were present when the verdict was rendered and the verdict should be one of acquittal or of disagreement. After he had thus expressed himself, he requested my counsel to agree that I need not be present at

the time when the verdict was rendered and the jury polled. In the same conversation the Judge expressed his opinion to counsel, that even they might be in danger of violence should they be present at the reception of the verdict. Under these circumstances they agreed with the Judge, that neither I nor they should be present at the rendition of the verdict.''

''I knew nothing of this conversation, nor of any agreement made by my said counsel with the Judge, until after the rendition of the verdict and sentence of death had been pronounced.''

''Pursuant to this conversation, I was not brought into court at the time of the rendition of the verdict, and I was not present when the verdict was received and the jury was discharged, nor was any of my counsel present when the verdict was received and the jury discharged.''

''I did not give to my counsel nor to any one else, authority to waive my right to be present at the reception of the verdict, or to agree that I should not be present at that time, nor were they in any way authorized or empowered to waive my right so to be present; nor did I authorize my counsel, or any of them, to be absent from the court room at the reception of the verdict, or to agree that they or any of them might be absent at that time. My counsel were induced to make the aforesaid agreement as to my absence and their absence at the reception of the verdict, solely because of the statement made to them by the Presiding Judge, and their belief that if I were present at the time of the reception of the verdict and it should be one of acquittal or of disagreement, it might subject me and them to serious bodily harm, and even to the loss of life.''

''Besides Messrs. Rosser and Arnold, I had as counsel Morris Brandon, Esq., and Herbert J. Haas, Esq. Neither of them was present when the verdict was received and the jury discharged. Neither the conversation with Judge Roan, nor the

purport thereof, was communicated to Messrs. Brandon and Haas, nor did they have any knowledge thereof, until after sentence of death had been pronounced against me.''

Mob Action After the Charge and at the Reception of the Verdict.

''After the jury had been finally charged by the Court and the case had been submitted to it, when Mr. Dorsey, the Solicitor General, left the court room, a large crowd on the outside of the Court House and in the streets, greeted him with loud and boisterous applause, clapping their hands and yelling 'Hurrah for Dorsey,' placed him upon their shoulders, and carried him across the street into a building, where his office is located. The crowd did not wholly disperse during the interval between the submission of the case to the jury and the return of the jury to the court room with its verdict, but during the entire period a large crowd was gathered in the immediate vicinity of the Court House. When it was announced that the jury had agreed upon a verdict, a signal was given from within the court room to the crowd on the outside to that effect, and the crowd outside raised a mighty shout of approval, and cheered while the polling of the jury proceeded. Before more than one juror had been polled, the applause was so loud and the noise was so great, that the further polling of the jury had to be stopped, so that order might be restored, and the noise and cheering from without was such, that it was difficult for the Presiding Judge to hear the responses of the jurors as they were being polled, although he was only ten feet distant from the jury.''

''All of this occurred during my involuntary absence from the court room, I being at the time in the custody of the Sheriff of Fulton County and incarcerated in the jail of said County, my absence from the court room, and that of my counsel, hav-

ing been requested by the Court because of the fear of the Court that violence might be done to me and my counsel had I or my said counsel been in court at the time of the rendition of the verdict."

"Thereafter, on August 26, 1913, I was sentenced to death by said Superior Court of Fulton County, Georgia, and remanded to the custody of C. Wheeler Mangum, Sheriff and ex-officio jailer as aforesaid, said Court being at that time without jurisdiction over me or over the cause in which said verdict was rendered, because of my involuntary absence from the court at the time of the rendition of the verdict and of the polling and discharge of the jury, said trial having thereby become a nullity and the proceedings of Hon. L. Roan, Presiding Judge, in receiving said verdict and polling the jury and discharging it, being *coram non judice* and devoid of due process of law."

Proceedings in the State Court After the Verdict.

The petition then states the subsequent history of the case as follows (*Rec. pp. 5 and 6*):

On August 26, 1913, Frank's counsel filed a motion for a new trial. This was denied on October 21, 1913, Hon. L. S. Roan, the Presiding Judge, on denying the motion, saying, that the jury had found the defendant guilty; that he had thought about the case more than any other that he had ever tried; that he was not certain of the appellant's guilt; that with all the thought he had put on the case he was not fully convinced that he was innocent or guilty, but that he did not have to be convinced; that there was no room to doubt

that the jury was, and that he felt it his duty to order that the motion for a new trial be overruled.

The cause was then taken on writ of error to the Supreme Court of Georgia, where, on February 17, 1914, a judgment was rendered affirming the judgment of conviction of the Superior Court of Fulton County and denying appellant's motion for a new trial. (*Frank* v. *State, 141 Ga. 243.*)

On April 16, 1914, the appellant filed his motion in the Superior Court of Fulton County, Georgia, to set aside the verdict rendered against him, on the grounds above stated, namely, that he was involuntarily absent from the court when the verdict against him was received and the jury discharged, in violation of his constitutional rights, and that he was deprived of a fair and impartial trial, of due process of law, and of the equal protection of the laws; that he did not waive the right to be present at the reception of the verdict, and did not authorize the waiver of such right on his behalf by his counsel or by any other person, nor consent that he should not be present at the rendition of the verdict, or that his counsel should be absent at the time; that any agreement made by his counsel in his absence and without his knowledge or consent, that he should not be present at the time of the rendition of the verdict, was of no legal force or effect, and that by reason of the premises the verdict rendered against him was a nullity.

The State of Georgia, by the Solicitor General, demurred to this petition, and on June 6, 1914, it was dismissed on the demurrer, and judgment was rendered against the appellant.

The judgment was then taken by writ of error to the Supreme Court of Georgia, where, on No-

vember 14, 1914, a judgment was rendered by that court which affirmed the judgment of the Superior Court of Fulton County sustaining the State's demurrer and dismissing the appellant's motion to set aside the verdict.

The grounds of this judgment are to be found in the opinion, *Rec. pp. 22-39.* They are, in substance, (1) that a person accused of crime has a right to be present at the time of the rendition of the verdict against him, but such right is an incident of the trial; (2) that his absence at the time of the rendition of the verdict was a mere irregularity that can be waived by him; (3) that under the laws of Georgia a motion for a new trial is an available remedy by which to attack a verdict rendered in the absence of one accused of crime; (4) that after the making of a motion for a new trial and the affirmance of judgment denying the same by the Supreme Court, a motion made thereafter to set aside the verdict on the ground that the accused had been absent from the court room when the verdict was rendered, comes too late.

Under previous decisions of the Supreme Court of Georgia, and under the practice which had prevailed throughout the State prior to the rendering of the opinion just referred to, the proper procedure for attacking as a nullity a verdict rendered in the absence of a prisoner had been held to be a motion to set aside the verdict. A motion for a new trial had been treated as not being the proper remedy. The former decisions of the Supreme Court of Georgia were unanimous decisions, and, under the laws of that State, had the force of a statute until reversed by a full bench, after argument, on a request for review granted by the court.

No previous decision of the Supreme Court of Georgia, nor of the Court of Appeals of that State, these courts being its only appellate courts and its highest courts, had ever declared that a motion to set aside as a nullity a verdict rendered in a prisoner's absence was not a valid remedy to attack such verdict. The decision of the Supreme Court of Georgia in appellant's case, which determined that a motion for a new trial was an available remedy in such a case, and denied appellant's right to move to set aside the verdict on the grounds hereinbefore stated, was the first decision of this kind ever rendered by that court or by the Court of Appeals of Georgia.

The appellant contends that this decision had the effect of depriving him of a substantial right given to him by the laws in force at the time to which his alleged guilt related, and at the time of the reception of the verdict against him and the presentation and decision of the motion for a new trial, and took from him a right which at all of these times was vital to the protection of his life and liberty, and constituted the passing of an *ex post facto* law, in violation of the prohibition contained in Article I, Section 10, of the Constitution of the United States, and is illegal and void; and likewise deprived him of due process of law and of the equal protection of the laws.

Efforts to Review Decision by Writ of Error.

On November 18, 1914, appellant applied to the Supreme Court of Georgia for a writ of error to this Court, for a review of the judgment which had denied his motion to set aside the verdict, and on the same day this application was denied.

On November 21, 1914, the appellant applied to Mr. Justice Lamar, the Justice of this Court assigned to the Fifth Circuit, which includes the State of Georgia, for a writ of error to review the judgment. This application was denied on November 23, 1914. A similar application was made to Mr. Justice Holmes, who denied the same on November 25, 1914; and an application having thereafter been made to Mr. Chief Justice White, on reference thereof to the full bench of this Court it was denied on December 7, 1914, without opinion.

Having thus exhausted all of his remedies in the Courts of Georgia, and by applications for writ of error to this Court, to review the judgment denying his motion to set aside the verdict rendered against him, and having been afforded no adequate and efficient means for asserting and obtaining his rights under the Constitution under a writ of error, the appellant filed his petition in the United States District Court for the Northern District of Georgia, to be discharged from custody because of the nullity of the verdict received in his absence, and of the judgment rendered thereon and his commitment thereunder. In substantiation of his contention that the Superior Court of Fulton County, Georgia, wherein he was convicted of the crime of murder, had lost jurisdiction over him, he averred:

Appellant's Grounds for Asserting the Nullity of Verdict and Judgment.

"(1) The reception, in my absence, of the verdict convicting me of the crime of murder, tended to deprive me of my life and liberty without due

process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, the protection of which I expressly invoke.

(2) I had the right to be present at every stage of my trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

(3) My involuntary absence at the time of the reception of the verdict and the polling of the jury, deprived me of the opportunity to be heard which constitutes an essential prerequisite to due process of law.

(4) This opportunity to be heard, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

(5) My right to be present during the entire trial, including the time of the rendition of the verdict, was one which neither I nor my counsel could waive or abjure.

(6) My counsel having had no express or implied authority from me to waive my presence at the time of the rendition of the verdict, and it being in any event beyond my constitutional power to give them such authority, their consent to the reception of the verdict in my absence was a nullity.

(7) Since neither I nor my counsel could expressly waive my right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by me or acquiescence on my part in any action taken by my counsel.

(8) My involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, incapable of being waived, directly or indirectly, expressly or impliedly, before

or after the rendition of the verdict, the failure to raise the jurisdictional question on my motion for a new trial, did not deprive me of my constitutional right to attack as a nullity the verdict rendered against me and the judgment based thereon.

(9) My trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to me, and whose conduct, intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and, for that reason also, I was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment of the Constitution of the United States, the protection of which I expressly invoke."

GROUNDS OF DENIAL OF RELIEF BY JUDGE NEWMAN.

Judge Newman, on denying the application for a writ of *habeas corpus*, rendered an opinion, in which, after stating the various applications that had been made to this Court for the allowance of a writ of error to the Supreme Court of Georgia to review its action on the motion to set aside the verdict rendered against the appellant, said:

"How this court could be justified in issuing this writ when this record is disclosed to it, I am unable to see. If this writ should issue, notwithstanding all that has occurred, and this applicant should be brought into court, the only thing the court here could do would be to hear evidence and determine whether this applicant had been denied the equal protection of the laws and due process of law, and consequently should be discharged. It seems to me that this would be the exercise by this court of supervisory power over the action of the State courts in a manner not warranted by

the Constitution or the laws of the United States. Also the court would be considering the matter as proper for hearing and decision here in the face of the decisions of two Justices of the Supreme Court —indeed of the entire court—to the effect, as stated, that no Federal question remained for consideration or now exists in the case. I am not aware of any precedent for such action in a case like this on the part of this court, and none has been referred to by counsel for the appellant who have so ably presented and argued this case. *No question whatever is made about the jurisdiction of the court trying the case originally and subsequently reviewing it on writ of error.* Believing from the petition itself, therefore, that the appellant is not entitled to the writ of *habeas corpus* or to the relief prayed, the application for the same is denied.''

Thereafter, as has been already stated, an appeal from the judgment of the United States District Court for the Northern District of Georgia was allowed by Mr. Justice Lamar, pursuant to the provisions of the Act of Congress of March 10, 1908, Chapter 76 (35 Statutes at Large, p. 40).

In support of his appeal the appellant presents the following (*Rec. pp. 226-229*):

ASSIGNMENTS OF ERROR.

''*First.*—The said District Court of the United States erred in holding that the appellant's application and the exhibits and records therein referred to did not make a case wherein the said Court could properly allow the issuance of the writ of *habeas corpus* prayed for.

Second.—The said District Court of the United States erred in holding, that the denial by the Supreme Court of the United States and by the sev-

eral Justices thereof of appellant's application for a writ of error to the Supreme Court of Georgia, to review the judgment of that court affirming the judgment of the Superior Court of Fulton County, Georgia, denying the appellant's motion to set aside the verdict rendered in the said court convicting him of murder, deprived this appellant of his right to the issuance of a writ of *habeas corpus* as prayed for.

Third.—The said District Court of the United States erred in holding that it could not entertain the petition of the appellant for the issuance of a writ of *habeas corpus* herein because it would be the exercise by said Court of supervisory power over the action of the State courts in a manner not warranted by the Constitution or the laws of the United States.

Fourth.—The said District Court of the United States erred in holding, that by entertaining the appellant's petition for a writ of *habeas corpus* it would do so in the face of alleged decisions of two Justices of this Court, and of this Court, that no Federal question remained for consideration, or now exists in this cause.

Fifth.—The said District Court of the United States erred in holding, that no question was made concerning the jurisdiction of the Superior Court of Fulton County, Georgia, in trying the indictment wherein the appellant was charged with the crime of murder.

Sixth.—The said District Court of the United States erred in holding, that the appellant is not entitled to the writ of *habeas corpus* or the relief prayed for, and that his application for the same should be denied.

Seventh.—The said District Court of the United States erred in refusing to hold, that the Superior

Court of Fulton County, Georgia, lost jurisdiction over the appellant on his trial for murder in said court, because of his involuntary absence from the court at the time of the rendition of the verdict against him and of the polling and discharge of the jury, said trial having thereby become a nullity, and the proceedings of said court in receiving said verdict and polling the jury and discharging it, were *coram non judice*, and devoid of due process of law.

Eighth.—The said District Court of the United States erred in refusing to hold that the judgment pronounced against the appellant in the Superior Court of Fulton County, Georgia, whereby he was sentenced to death and under which he is now in the custody of C. Wheeler Mangum, Sheriff of Fulton County, Georgia, was a nullity, and all subsequent proceedings thereto are nullities, because at the time when said judgment was pronounced the said Superior Court of Fulton County, Georgia, had lost jurisdiction over the appellant and of this cause.

Ninth.—The said District Court of the United States erred in refusing to hold, that the reception by the Superior Court of Fulton County, Georgia, on the appellant's trial for murder in said court, in his absence, of the verdict convicting him of the crime of murder, tended to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Tenth.—The said District Court of the United States erred in refusing to hold, that the appellant had the right to be present at every stage of his trial in the Superior Court of Fulton County, Georgia, including the reception of the verdict against him, the polling of the jury and the discharge of the jury, and that this right was a fundamental right essential to due process of law.

Eleventh.—The said District Court of the United States erred in refusing to hold, that the involuntary absence of the appellant at the time of the reception of the verdict on his trial in the Superior Court of Fulton County, Georgia, and the polling of the jury, deprived him of an opportunity to be heard, which constituted an essential prerequisite to due process of law.

Twelfth.—The said District Court of the United States erred in refusing to hold, that the appellant's opportunity to be heard on his trial in the Superior Court of Fulton County, Georgia, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Thirteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's right to be present during the entire trial, including the time of the rendition of the verdict against him in the Superior Court of Fulton County, Georgia, was one which neither he nor his counsel could waive nor abjure.

Fourteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's counsel having had no express or implied authorization from him to waive his presence at the time of the rendition of the verdict against him in the Superior Court of Fulton County, Georgia, and it being in any event beyond his constitutional power to give them such authority, their consent to the reception of the verdict in his absence was a nullity.

Fifteenth.—The said District Court of the United States erred in refusing to hold that since neither the appellant nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any ratifica-

tion by him or acquiescence on his part in any action taken by his counsel.

Sixteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's involuntary absence at the reception of the verdict rendered against him in the Superior Court of Fulton County, Georgia, constituting as it did an infraction of due process of law, incapable of being waived directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, his failure to raise the jurisdictional question on his motion for a new trial did not deprive him of his constitutional right to attack as a nullity the verdict rendered against him and the judgment based thereon.

Seventeenth.—The said District Court of the United States erred in refusing to hold, that the appellant's trial in the Superior Court of Fulton County, Georgia, did not proceed in accordance with the orderly process of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to him and whose conduct intimidated the court and jury and unduly influenced them and neutralized and over-powered their judicial functions, and because for that reason he was deprived of due process of law and of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Eighteenth.—The said District Court of the United States erred in refusing to hold, that the decision of the Supreme Court of Georgia, which determined that the appellant's motion to set aside the verdict rendered against him in the Superior Court of Fulton County, Georgia, on the ground of his absence at the time of the rendition of said verdict, was not an available remedy to attack such verdict but that the objection should have been raised on the motion for a new trial, deprived the

appellant of a substantial right given to him by the law in force at the time to which his alleged guilt related and at the time of the reception of the verdict against him and of the presentation and decision of the motion for a new trial made by him, and took from him a right which at all of said times was vital to the protection of his life and liberty, and constituted the passing of an *ex post facto* law in violation of the prohibition contained in Article L, Section 10, of the Constitution of the United States, and was illegal and void.

Nineteenth.—The said District Court of the United States erred in refusing to hold, that the judgment of the Supreme Court of Georgia, rendered on November 14, 1914, deprived him of due process of law, and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States, because the Court thereby in effect declared, that in order to avail himself of his aforesaid constitutional rights, to wit, the assertion of his right to due process of law and to the equal protection of the laws, he would be compelled to subject himself to a second jeopardy, thus depriving him of his aforesaid constitutional rights except on the illegal condition of the surrender by him of the right secured to all persons charged with criminal offenses in the State of Georgia under paragraph 8, section 1, Article I, of the Constitution of said State."

POINTS.

I.

The reception by the Superior Court of Fulton County of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the Court and the nullification of the verdict and judgment.

Statement of Appellant's Position.

The appellant was on trial, charged with the crime of murder, a capital offense. The Constitution of Georgia (*Art. VI, § 18, par. 1*) declares that "the trial by jury, except where it is otherwise provided in the Constitution, shall remain inviolate." A jury had been empaneled to try the appellant for the crime charged in the indictment. They were by *Art. I, §2, par. 1* of the Constitution made "the judges of the law and the facts."

Under another clause, it was further declared (*Art. I, § 1, par. 4*): "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State *in person*, by attorney, *or both*," and in the very next para-

graph of that instrument, this right was emphasized by the statement: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel."

The tribunal by which the appellant was thus to be tried, and before which he had the constitutional right to defend himself in person and by counsel, against the grave charge of which he stood indicted, consisted of the presiding judge, Hon. L. S. Roan, and a common law jury of twelve. If he was involuntarily deprived of the right of defense before this tribunal, at any stage of the trial, such deprivation constitutes, we contend, a denial of due process of law. Thus, if the entire trial had been conducted in his absence, or if he had been kept out of the court room while the witnesses of the prosecution were undergoing examination, or while the witnesses in his defense were sworn, or on alternate days, or while counsel were presenting their arguments, or whilst the court was instructing the jury, he would unquestionably have been deprived of the right to defend himself, of the opportunity to become a participant in the judicial investigation which had for its end the ascertainment of his guilt or innocence, and the determination as to whether or not his life and liberty were to be forfeited.

We shall presently show, that his involuntary absence at the time of the rendition of the verdict and the polling of the jury, in obedience to the wishes of the presiding judge, which were under the circumstances the equivalent of a command, was equally a deprivation of due process of law.

Before presenting the authorities on which we rely to substantiate that proposition, a consideration of the fundamental elements of due process,

as indicated by the decisions of this Court, will be useful.

The Essential Elements of Due Process.

Although the Court has, very wisely, refrained from attempting a comprehensive definition of due process, it has, nevertheless, determined, by a long line of decisions, that in so far it relates to legal procedure which may affect life, liberty or property, due process depends on the concurrence of two component elements, (1) notice to the person affected, of the proceedings by which he is sought to be charged or condemned, and (2) the right of the person proceeded against to a hearing or an opportunity to be heard in his defense.

We shall later under Point II indicate a third element, namely, a competent tribunal to pass on the subject-matter.

This right to be heard, or this opportunity to be heard, is not one which is limited to any particular phase of the proceeding. It is not granted, if it may be taken away or withheld at any stage of proceedings which may result in condemnation. It is co-extensive with the entire proceeding, from its beginning to its termination. Thus a party would be deprived of due process were he merely permitted to interpose an answer, and thereafter prohibited from participating in the trial of issues on which his life, liberty or property depended, or from examining and cross-examining witnesses, or from being present and heard at the various stages of the proceeding.

The right or opportunity to be heard in such a case would be idle, if accorded in the early or preliminary stages of a trial and denied at its culmin-

ation. The mere interposition of an answer or a plea, without the right of participation in the trial in all of its subsequent stages, would be the substitution of form for substance, and a disregard of the underlying purpose of legal process. The object of legal process, is not merely to bring a party into court, but to enable him, when brought there, to be present for the protection of his rights, and to meet any emergency that may arise, until judgment has been pronounced.

Hovey vs. *Elliott.*

The principle which we invoke was elaborately and lucidly considered in *Hovey* v. *Elliott, 167 U. S. 409*—a great constitutional landmark. There, the court of original jurisdiction had after the service of process and the joinder of issue stricken defendant's answer from its files, as a punishment for his contempt in refusing to obey one of its orders. In consequence, a decree *pro confesso* was entered against him. Its validity was challenged, and its nullity was adjudicated by this Court, because it was wanting in due process of law, from the instant that the defendant was debarred from being further heard in his defense. Mr. Justice White said:

"In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to

punish for a contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessary depends.

"In *McVeigh* v. *United States, 11 Wall. 259,* the court, through Mr. Justice Swayne, said (p. 267): 'In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice. *Calder* v. *Bull, 3 Dallas, 388; Bonaker* v. *Evans, 16 Adolphus & Ellis, 170; Capel* v. *Child, 2 Crompton & Jervis, 574.*'

"And quoting with approval this language, in *Windsor* v. *McVeigh, 93 U. S. 274,* the court, speaking through Mr. Justice Field, again said (pp. 277, 278): 'The principle stated in this terse language

lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. *A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether.* It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.'

"This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard. Thus Coke (*2 Inst. 346*), in commenting on the 29th chapter of Magna Charta, says: 'No man shall be disseized,

etc., unless it be by the lawful judgment; that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all), by the due course and process of law.' * * *

"Story, in his treatise on the Constitution (*vol. 2, § 1789*), speaking of the clause in the Fifth Amendment, where it is declared that no person 'shall be deprived of life, liberty or property without due process of law,' says: 'The other part of the clause is but an enlargement of the language of Magna Charta, '*nec super eum ibimus, nec super eum mittimus, nisi per legale judicium pariium suorum, vel per legem terrae*' (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *per legum terrae* (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brougt in to answer thereto by due process of the common law. *So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.*'

"Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce

justice, courts possess the right to inflict the very wrongs which they were created to prevent."

"In *Galpin* v. *Page, 18 Wall. 350,* the court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'

"Again, in *Ex Parte Wall. 107 U. S. 265, 289,* the court quoted with approval the observations as to 'due process of law,' made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College case*: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, *which proceeds upon inquiry and renders judgment only after trial.* The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"

"And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they *'proceed upon inquiry,'* and *'render judgment only after trial.'*"

"The necessary effect of the judgment of the Supreme Court of the District of Columbia was to

decree that a portion of the award made in favor of the defendant, in other words, his property, belonged to the complainants in the case. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law. If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, *why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law. No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards.*"

Windsor vs. *McVeigh.*

In *Windsor* v. *McVeigh, supra,* Mr. Justice Field in addition to what was quoted from his opinion in *Hovey* vs. *Elliott* (*supra*) said:

"The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its ap-

plication. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * *

"*So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose.* The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. *And the reason is, that the courts are not authorized to exert their power in that way.*

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, *according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.* * * *

"It was not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, *and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing.* And where, as in that case, no appearance was allowed, there could be

no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. *By the act of the court, the respondent was excluded from its jurisdiction.*"

If, in *Hovey* v. *Elliott,* the court had not stricken out the answer, or, if in *Windsor* v. *McVeigh,* it had not stricken out the appearance of the owner of the property which was sought to be seized, and had heard the proofs of all the parties, but had, in the one case because of the defendant's contempt of court, and in the other because of the defendant's residence within the Confederate lines, refused a hearing on the final argument, there can be no doubt but that the judgments rendered in the cases cited would have been regarded as devoid of due process of law.

It is immaterial at what stage of the litigation the right to be heard, or the opportunity to be heard, is withheld. So long as it is actually interfered with by the direct or indirect action of the court, there is a denial of due process. This rule, which has been applied in civil actions which merely affect a right of property, is of superlative importance in a criminal action which involves life and liberty. It would be of little avail in such a case, for a defendant to appear before the court and jury long enough to interpose his plea, or at such times when the court might deem it advisable or prudent for him to be present, only to be treated at all other times as a stranger to the proceedings. That would amount to a virtual withholding of that opportunity to be heard which is vitally essential to a full and unrestrained defense. Indeed, in a criminal case, the hearing to

which the accused is entitled, is the right of defense, and that is not to be limited, curtailed or circumscribed. It is not to be suddenly cut off, when he is in direst need. If he may be locked up at a time when his fate hangs trembling in the balance, and when his judges are themselves subject to interrogation, is his right of defense not taken from him? If when the jury is about to render its verdict, he is absent, and his counsel are absent, and the prosecution and a hostile mob alone are present, to confront the twelve jurors, what has become of his opportunity to be heard which is the *sine qua non* of due process? Might not the jury reach the natural conclusion that the defense had been abandoned? Or, might they not be confirmed in the fear, that a verdict in favor of the accused, might prove their own death-warrant?

The prohibitions of the Fourteenth Amendment refer to all of the instrumentalities of the State, legislative, executive and judicial, and therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by that Amendment against deprivation by a State, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

Chicago Burlington & Quincy R. R. Co. v *Chicago, 166 U. S. 226.*

The cases which have thus far been cited, were all instances of an infraction of due process of law by judicial authority.

As further indicating the application of the prohibitions of the Fourteenth Amendment to the judgment of a court, we refer to *Scott* v. *McNeal, 154 U. S. 34.*

That case involved the validity of a decree of a court of probate appointing an administrator of the estate of a living person, made after public notice. Mr. Justice Gray laid down the rule of decision applicable, in these admirable words:

"Their prohibitions extend to all acts of the State, whether through its legislative, its executive, *or its judicial authorities. Virginia* v. *Rives, 100 U. S. 313, 318, 319; Ex parte Virginia, 100 U. S. 339, 346; Neal* v. *Delaware, 103 U. S. 370, 397.* And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank, 92 U. S. 542, 554,* repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely, 4 Wheat. 235, 244,* was intended '*to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*'

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must

decide for itself the true construction of the statute. *Huntington* v. *Attrill, 146 U. S. 657, 683, 684; Mobile & Ohio Railroad* v. *Tennessee, 153 U. S. 486, 492-495.*

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.' *Pennoyer* v. *Neff, 95 U. S. 714, 733.*"

Standard Oil Co. vs. *Missouri.*

One of the most recent applications of this doctrine is afforded by *Standard Oil Co.* v. *Missouri, 224 U. S. 270, 280-282,* where Mr. Justice Lamar said:

"The briefs and arguments for the defendants were addressed mainly to the proposition that the fine of $50,000 was a criminal sentence in a civil suit and void because beyond the jurisdiction of the court, and, for the further reason, that the pleadings and prayer gave no notice which would support such a sentence.

1.—It is, of course, essential to the validity of any judgment that the court rendering it should

have had jurisdiction, not only of the parties, but of the subject-matter. *Chicago, B. & Q. Ry. Co.* v. *Chicago, 166 U. S. 226, 234, 247.* * * *

2.—The Federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.' *Windsor* v. *McVeigh, 93 U. S. 274, 282.* See also *Reynolds* v. *Stockton, 140 U. S. 254, 265-268. Barnes* v. *Railway, 122 U. S. 1, 14.*"

Ex parte Riggins.

The interesting case of *Ex parte Riggins, 134 Fed. Rep. 404*, although reversed on the ground that *habeas corpus* was not the proper remedy, in *Riggins* v. *United States, 199 U. S. 547*, and in its general conclusion overruled in *Hodges* v. *United States 203 U. S. 1*, on the ground that the Fourteenth and Fifteenth Amendments operate solely on State action and not on individual action) nevertheless presents a valuable and apparently sound contribution to an important aspect of the subject, which we are now considering. Riggins was indicted in the United States District Court on the charge that he had, with others, conspired to murder one Maples, a negro, by lynching him, thus depriving him of his life without due process of law. It was claimed that those engaged in the conspiracy could be proceeded against on the theory that the Fourteenth and Fifteenth Amendments operated in individual action, as well as against State action. In sustaining this view of the case, Judge Jones made the following convincing comments on the general nature of due process of law:

"The general duty of the state to afford due process of law to all persons is discharged, in the first instance, as we have seen, by the passage of proper legislation, and providing proper modes for securing the enjoyment of life, liberty, property, and the pursuit of happiness. This, however, is in no wise true of another phase of the duty, such as arises here, when the right to have due process at the hands of the state involves the enjoyment of the due administration of judicial procedure. When that is the case, there are many things which the state and its officers

must do or cause to be done, and in individual cases, by physical and mental operations, as distinguished from the exercise of legislative or political power, before the citizen can have the enjoyment at the hands of the state of due process of law. *When the state seeks to punish the citizen for a crime, it must not only give the accused a right to appear before a lawful tribunal, but it must afford the opportunity as well. Having put the accused in jail, it must keep him safely and bring him before that tribunal. When it brings him there, it must bring his witnesses there, if they will not come. In Alabama it must confront him with a panel of his peers, from among whom he and the state elect a jury. A judge must be there to give the jury the law, and the prisoner may except and appeal, if dissatisfied with his rulings. The judge and jury must hear counsel in the prisoner's defense. Then the state must cause the jury to retire, where they will be guarded from outside influence, while they deliberate upon the guilt or innocence of the defendant, and then come again in court, in the prisoner's presence, and return a verdict. The prisoner, if dissatisfied, may poll the jury. He has the right to present whatever he can to the judge before sentence is pronounced, if found guilty, and then to have the execution of the sentence suspended until his appeal to the Supreme Court can be heard.*

Is it not clear that private individuals who overpower state officers, when they are endeavoring to protect a prisoner accused of crime, whom they have confined to the end that both he and the state may exercise their respective functions and rights before a judicial tribunal, and wrest the prisoner from their custody, and then murder him to punish him for the crime, do, in the constitutional sense, as well as in every other sense, deprive the prisoner of the enjoyment of due process at the hands of the state, and prevent the state from affording it? *No one can deny that,*

under the Constitution, it is the prisoner's right to enjoy the workings of such due process, and that it is the duty of the state, under the Fourteenth Amendment, to dispense such justice to him. These rights cannot be enjoyed, or the duty enjoined upon the state discharged, except from the undisturbed workings of the machinery of justice after its power has once been put in motion, until the period arrives in the particular case where it may rightly stop. Until it has done its perfect work, the administration of due process, which in a case like this cannot be enjoyed except by the regular and orderly working of judicial procedure, is not afforded by the state. It may be true the state was not at fault; but that does not obliterate the fact that it was prevented from causing to be done the physical and mental acts which alone constitute the discharge of the duty in this case, and that by means of lawless violence, directed at the state and the prisoner alike, the prisoner has been prevented from enjoying the right to have the state do or cause to be done the physical or mental tasks which alone can afford him due process of law.

It cannot be contended, with any foundation in reason, that the right, privilege, or immunity of the accused to have due process at the hands of the state is neither derived from nor secured by the Constitution of the United States. The phrase 'due process' has had a well-defined meaning for ages. It had been previously employed in the Fifth Amendment. Putting it in the Fourteenth Amendment not only granted, but directly defined, certain specific rights which inure to the benefit of every person, alien as well as citizen, and are 'derived from, dependent upon, or secured by the Constitution of the United States.' The right thus created and defined, in a case like this, involving life and liberty, is the right to enjoy the benefits of all proceedings which constitute a trial according to 'the law of the land.' But it cuts deeper than this. The law of the land,

applying to all persons impartially, might not afford some of the rights which this clause of the Constitution grants and secures to the citizen and compels the state to afford. If, for instance, the state should deprive a person of the benefit of counsel, it would not be due process of law. It it allowed a private person to pass judgment on him for crime, it would not be due process. Within certain limits the state may change its remedies at pleasure, but it must be 'with due regard to the landmarks established for the protection of the citizen.' It must not exercise 'arbitrary power, or depart from the principles of private right and distributive justice.' As declared by the Supreme Court, the Fourteenth Amendment, in its requisition concerning due process, 'is not too vague and indefinite to operate as a practical restraint.' *Hurtado* v. *California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232.* As there declared, 'due process must, in the language of Mr. Webster, be, according to his familiar definition, the general law, or law which hears before it condemns, and which proceeds upon inquiry and renders judgment.' * * *

Under the due process clause, the vital essence of the grant, of what it shall consist, flows from the Constitution of the United States itself. It is beyond the power of the state in any way to withhold anything thus granted. From the very nature of the right, whenever the administration of due process involves the administration of judicial procedure, the state must not only pass fair laws, but through its officers must do, or cause to be done, certain physical and mental operations in individual cases, which operate directly upon a particular individual, the benefits of which he cannot enjoy unless the officers of the state are permitted to perform them or cause them to be performed, according to the established course of judicial procedure, when he is present and asserting his rights. Undoubtedly, then, private persons may defeat enjoyment, in the constitutional sense, of the right, privilege, or immunity of the citizen

to have the state afford him due process of law in many cases.''

Further Authorities on the Right To Be Heard.

As illustrations of the application of the principle to *quasi* judicial power, we cite *Central of Georgia Railway* v. *Wright, 207 U. S. 127* and *Londoner* v. *Denver, 210 U. S. 385.*

In the first of these cases it was held that due process of law requires that opportunity to be heard as to the validity of a tax and the amount of the assessment be given to a taxpayer, who, without fraudulent intent and in the honest belief that he is not taxable, withholds property from tax returns, and this requirement is not satisfied where the taxpayer is allowed to attack the assessment only for fraud and corruption. The assessment of a tax is action judicial in its nature requiring for the exertion of the power such opportunity to appear as the circumstances of the case require, and this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining whether the taxpayer has been afforded due process of law. Mr. Justice Day said:

''In view of this statute as thus construed the question made is, whether due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds, withholds property from tax returns with an honest belief that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward

upon a suit to collect taxes, or by independent suit to enjoin their collection. * * *

"It would be impossible to reconcile the different holdings in the State courts upon this subject. One class holds that upon the assessment of omitted property the taxpayer has no right to be heard, having by his failure to return submitted himself to 'the doom of the assessor.' Another class holds that in such cases there must be an opportunity to be heard before the taxpayer can be assessed, and that to deny him such right as a penalty for failure to return is a denial of due process of law secured to the taxpayer by many State Constitutions as well as the Fourteenth Amendment of the Constitution of the United States."

"Of course, this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining this question for itself."

"Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. *Davidson* v. *New Orleans, 96 U. S. 97; Weyerhauser* v. *Minnesota, 176 U. S. 550; Hager* v. *Reclamation District, 111 U. S. 701.*

"In the late case of *Security Trust & Safety Vault Co.* v. *The City of Lexington, 203 U. S. 323,* decided at the last term of this court, the subject underwent consideration, and it was there held that before an assessment of taxes could be made upon omitted property notice to the taxpayer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In that case it was further held that where the pro-

cedure in the State court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied."

"Applying the principles thus settled to the statutory law of Georgia, as construed by its highest court, does the system provide due process of law for the taxpayer in contesting the validity of taxes assessed under its requirements?"

Londoner v. *Denver* (*supra*), also involved the validity of an assessment for a local improvement. Mr. Justice Moody, dealing with the sufficiency of the hearing accorded by the legislature, said:

"In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this Court has regarded substance and not form. But where the Legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. * * * It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization. If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the

case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal. *Pittsburg, &c. Railway Co.* v. *Backus, 154 U. S. 421, 426; Fallbrook Irrigation District* v. *Bradley, 164 U. S. 112, 171.* It is apparent that such a hearing was denied to the plaintiffs in error. * * * The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it."

In *City and County of Denver* v. *State Investment Co., 49 Col. 244, 112 Pac. Rep. 789, 33 L. R. A., N. S., 395,* which follows *Londoner* v. *Denver, 210 U. S. 373,* the court said:

"Unless the law authorizing the assessment expressly or by implication, provides for notice to the owner of the property to be affected, and gives him an opportunity to be heard at a specified time and place, before board or tribunal competent and ready to administer proper relief, concerning the correctness of the charge, before it is made conclusive, the constitutional guaranty that no person's property shall be taken withiut due process of law has been infringed. *Brown* v. *Denver, 7 Colo. 305, 3 Pac. 455.* Notice or citation of the time and place for hearing, or possibly a waiver thereof by the property owner, was therefore essential to vest in the council the power to create a valid lien for the cost of the improvement, and it was likewise essential that the hearing be before a tribunal competent to act. The denial to a party in such a case of the right to appear and to be fully heard is, in legal effect, a recall of the citation to him. *Windsor* v. *McVeigh, 93 U. S. 274.*

* * * A judgment, finding or decree rendered under such circumstances is an arbitrary edict without the sanction of law. As stated by Brannon, in his work on the 14th Amendment, page 251: 'Though there be service of process, yet, if the defendant is not allowed to make his defense, it is a withdrawal of the summons, 'a denial of the benefit of a notice, and would in effect be to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether,' because judgment without hearing is void.' * * * It certainly cannot be said that a party has had a hearing when he has been called to appear, or appears, before a tribunal with power to act and grant relief, and which recognizes that such party is entitled to the relief for which he prays, yet disclaims in itself power and authority in the premises, and refuses to hear evidence and act upon the matter. The right to property and the guaranty that it shall not be taken without due process of law, does not rest upon a basis so unsubstantial.''

The appellee will doubtless cite many decisions of this Court, in which it was held that the various statutes and proceedings affecting criminal and *quasi* criminal procedure in State courts, which were the subject of consideration, did not constitute a denial of due process of law. Of these cases, we deem it important to consider the following:

Decisions Probably Relied on by the State.

Hurtado v. *California, 110 U. S. 516.*
Allen v. *Georgia, 166 U. S. 138.*
Brown v. *New Jersey, 175 U. S. 172.*
Maxwell v. *Dow, 176 U. S. 581.*
Simon v. *Craft, 182 U. S. 427.*
Twining v. *New Jersey, 211 U. S. 78.*
Hammond Packing Co. v. *Arkansas, 212 U. S. 322.*
Jordan v. *Massachusetts, 225 U. S. 167*
Garland v. *Washington, 232 U. S. 642.*

We believe all of these cases to be distinguishable from the present, and in order to point out the differences which exist between them and this, and the recognition in them of the fundamental principles on which we rely, we take the liberty of quoting at some length from the opinions rendered, declaring at the outset, that it is not our contention that the appellant's enforced absence from the court at the time of the reception of the verdict, was a mere interference with a privilege or immunity, but that it amounted to a deprivation of due process of law, within the meaning of the Fourteenth Amendment.

Hurtado vs. *California.*

In *Hurtado* v. *California, 110 U. S. 516,* it was held that the words "due process of law" in the Fourteenth Amendment, do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. After discussing the various definitions of the phrase, among them the language of Mr. Justice Miller in *Davidson* v.

New Orleans, 96 U. S. 97-105. "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case," Mr. Justice Matthews said:

"We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. * * * According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth

Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. * * *

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communi-

ties to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves those principles of liberty and justice, must be held to be due process of law."

Allen vs. *Georgia.*

In *Allen* v. *Georgia, 166 U. S. 138,* the prisoner had been convicted in the State court of murder, and sued out a writ of error from the Supreme Court of the State. On the day assigned for its hearing it appeared that he had escaped from jail and was a fugitive from justice. The court thereupon ordered the writ of error dismissed, unless he should within sixty days surrender himself or be recaptured, and when that time passed without either happening, the writ was dismissed. He was afterwards recaptured, and resentenced to death, whereupon he sued out a writ of error to this Court, assigning as error that the dismissal of his writ by the Supreme Court of Georgia was a denial of due process of law. This contention was denied, and in the course of the opinion Mr. Justice Brown said:

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a

State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. *The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.*

"We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offense; and it seems but a slight punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction."

Brown vs. *New Jersey.*

In *Brown* v. *New Jersey, 175 U. S. 172,* the question was presented as to whether a trial by a struck jury constituted due process of law. Dealing with this subject Mr. Justice Brewer said:

"The State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Ex parte Reggel, 114 U. S. 642; Iowa Central Railway* v. *Iowa, 160 U. S. 389; Chicago, B. & Q. Railroad* v. *Chicago, 166 U. S. 226.* * * *

"In providing for a trial by a struck jury, empanelled in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of se-

lection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to *select* jurors, but to secure an impartial jury. 'The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert, 116 U. S. 642.* The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained.' *Hayes* v. *Missouri, 120 U. S. 68, 71.*''

Maxwell vs. *Dow.*

In *Maxwell* v. *Dow, 176 U. S. 581,* the Court, following *Hurtado* v. *California,* decided that the trial of a person accused as a criminal by a petit jury of only eight persons instead of twelve, and his subsequent imprisonment after conviction, do not deprive him of his liberty without due process of law. Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a grand jury, are questions properly to be determined by the citizens of each State for themselves. Following the *Slaughter House Cases,* it was further held that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight Amendments to the Constitution against the powers of the Federal Government. Mr. Justice Peckham said:

''The question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado case, supra.* The distinct question was

there presented whether it was due process of law to prosecute a person charged with murder by an information under the State Constitution and Law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a petit jury of the number fixed by the common law. If the State have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the *Hurtado case* was decided are to be found gathered in *Hodgson* v. *Vermont, 168 U. S. 262; Holden* v. *Hardy, 169 U. S. 366, 384; Brown* v. *New Jersey, 175 U. S. 172; Bolln* v. *Nebraska, 176 U. S. 83.*

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado case* is a trial by jury mentioned as a necessary part of such process. * * * As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown* v. *New Jersey, 175 U. S. 172,* the State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.* The legislation in question is not, in our opinion, open to either of these objections."

Simon vs. *Craft.*

In *Simon* v. *Craft, 182 U. S. 427,* it was held that a person charged with being of unsound mind is not denied due process of law by being refused an

opportunity to defend, when, in fact, actual notice was served on him of the proceedings, and when, if he had chosen to do so, he was at liberty to make such defense as he deemed advisable. The due process clause in the Fourteenth Amendment to the Constitution does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an oppirtunity afforded to defend against it. Mr. Justice White said:

"The contention now urged is that notice imports an opportunity to defend, and that the return of the sheriff conclusively established that Mrs. Simon was taken into custody and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred that the State court interpreted the statute—that the purpose in the command of the writ, 'to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial,' was to enforce the attendance of the alleged *non compos*, rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be necessary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in a fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of this duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing

herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting. The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form. *Louisville & Nashville Railroad Co.* v. *Schmidt, 177 U. S. 230.* We cannot, then, even on the assumption that Mrs. Simon was of sound mind and fit to attend the hearing, hold that she was denied due process of law by being refused an opportunity to defend, when, in fact, actual notice was served upon her of the proceedings, and when, as we construe the statute, if she had chosen to do so, she was at liberty to make such defense as she deemed advisable. The view we take of the statute was evidently the one adopted by the judge of the probate court, where the proceedings in lunacy were heard, since that court, upon the return of the sheriff, and the failure of the alleged lunatic to appear, either in person or by counsel, in order to protect her interests, entered an order appointing a guardian *ad litem* 'in the matter of the petition to inquire into her lunacy;' and an answer was filed by such guardian denying all the matters and things stated and contained in the petition, and requiring strict proof to be made thereof according to law.''

Twining vs. *New Jersey.*

In *Twining* v. *New Jersey, 211 U. S. 78,* the question presented was whether exemption from compulsory self-incrimination in the State courts was secured by the Federal Constituion. In a masterly opinion, Mr. Justice Moody dealt with this subject from two points of view, first, whether such exemption was a privilege and immunity, and second, whether its denial was a deprivation

of due process of law within the meaning of the Fourteenth Amendment.

Dealing with the first proposition, the Court, following the decision in the *Slaughter House Cases, 16 Wall. 36,* decided that privileges and immunities, although fundamental, which do not arise out of the nature and character of the National Government, or are not specifically protected by the Federal Constitution, are attributes of State, and not of National, citizenship; that the first eight Amendments are restrictive only of National action, and that while the Fourteenth Amendment restrained and limited State action, it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first Eight Amendments. On the other hand, privileges and immunities of citizens of the United States were declared to be only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. The exemption from compulsory self-incrimination was declared not to be one of these.

Dealing with the second question, as to whether self-incrimination was a denial of due process of law, Mr. Justice Moody pointed out that, viewed historically, such exemption did not form part of the law of the land prior to the separation of the colonies from the mother-country, that it was therefore not one of the fundamental rights, immunities and privileges of citizens of the United States, and that the fact that exemption from compulsory self-incrimination was specifically enumerated in the guarantee of the Fifth Amendment, tended to show that it was to be regarded as a

separate right and not as an element of due process of law. In the course of this discussion the Court said (*p. 100*):

"What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Murray v. Hoboken Land Co., 18 How. 272, 280.*"

At *page 106* he said:

"But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law."

At *page 107* he says:

"The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, State or National, for they are secured otherwise, but the rights fundamental in due process, and therefore

an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? * * * None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215), and could not have been implied in the 'law of the land' there secured."

He then pointed out that it was not included in the Petition of Right or in the Bill of Rights, or in most of the Constitutions of the original States, and then proceeds (*p. 110*):

"The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here confronted with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. *We need*

notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. *Neff, 95 U. S. 714, 733; Scott* v. *McNeal, 154 U. S. 34; Old Wayne Life Association* v. *McDonough, 204 U. S. 8,* and *that there shall be notice and opportunity for hearing given the parties, Hovey* v. *Elliott, 167 U. S. 409; Roller* v. *Holly, 176 U. S. 398;* and see *Londoner* v. *Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries,* this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. * * *

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases *proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard,* then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in *Iowa Central* v. *Iowa, 160 U. S. 393*: 'But it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, *provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be*

heard before the issues are decided;' and in *Louisville & Nashville Railroad Co.* v. *Schmidt, 177 U. S. 230, 236*: 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State courts or regulate practice therein. All its requirements are complied with, *provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend;'* * * *

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, *it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property.''*

Hammond Co. vs. *Arkansas.*

In *Hammond Packing Co.* v. *Arkansas 212 U. S. 322,* the constitutionality of the provisions of the anti-trust statute of Arkansas and the validity of the proceedings in the State courts thereunder, were in question. The action was brought to recover statutory penalties for a violation of the law. The act required corporations to produce books and papers, and upon the refusal of the corporation to comply with that requirement, the answer, motion, demurrer, or other pleading filed by the corporation, was on motion of the Attorney General or Prosecuting Attorney to be stricken out and judgment rendered against the

corporation. Dealing with that provision, Mr. Justice White said:

"Lastly, with much earnestness and elaboration, it is urged that the action of the court, authorized by §9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey* v. *Elliott, 167 U. S. 409,* and the previous cases in this court which were there cited and applied. The ruling in *Hovey* v. *Elliott* was that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the Fourteenth Amendment. There the power to strike out and punish was exerted, by the court, in virtue of what it assumed to be its inherent authority, and the occasion which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute furnishes no ground for taking this case out of the ruling in *Hovey* v. *Elliott,* if otherwise controlling. The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what was done in *Hovey* v. *Elliott* was in that case deduced from no special infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the Government without transgressing the constitutional safeguard as to due process, at all time dominant and controlling where the Constitution is applicable. Indeed in *Hovey* v. *Elliott* the impotency of the legislative depart-

ment to endow the judicial with the capacity to disregard the Constitution was emphasized. But while this is true the question yet remains, Is the doctrine of *Hovey* v. *Elliott* here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if from doing so *it results that the authority exerted flows from a reservoir of unquestioned power it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power and not a mere incidental result arising from its exertion is the criterion by which its validity is to be measured. Hovey* v. *Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default.* The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, *as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey* v. *Elliott, and the power exerted in this, is as follows: In the former the process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the*

other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception therefore the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law.''

Jordan vs. *Massachusetts.*

In *Jordan* v. *Massachusetts, 225 U. S. 167,* the accused had been convicted by a jury and sentenced to death. After the verdict one of the jurors became insane, and the court, after an inquiry had in accordance with the established procedure of the State, found by a preponderance of evidence that the juror was of sufficient mental capacity during the trial to act as such, and therefore refused to set the verdict aside. Dealing with this subject Mr. Justice Lurton said:

''Subject to the requirement of due process of law, the States are under no restriction as to their method of procedure in the administration of public justice. *That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned.* 'Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.' * * *

"Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent State court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence, would be to enforce an exaction unknown to the precedents of the past, and an interference with the discretion and power of the State not justified by the demands of justice, nor recognized by any definition of due process.

"In criminal cases due process of law is not denied by a State law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict. Indeed the requirement of due process does not deprive a State of the power to dispense with jury trial altogether. *Hurtado* v. *California, 110 U. S. 516; Maxwell* v. *Dow, 176 U. S. 581. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present,* the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution."

Garland vs. *Washington.*

In *Garland v. Washington, 232 U. S. 642,* the plaintiff in error claimed that he had been deprived of due process of law, because he had been convicted and sentenced on an information on which he had never been arraigned and to which he had never pleaded, and relied on *Crain v. United States 162 U. S. 625.* This contention was overruled, but upon grounds which sustain rather than combat our present contention. Thus Mr. Justice Day said:

"It is apparent that the case was tried and convicted upon an information charging an offense against the law; that he had a jury trial, with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge against him and obtain an answer from him, was fully subserved in this case, for the accused had taken objections to the second information and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the Supreme Court of Washington, following its former decisions, held that the failure to enter the plea and deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution.

"Due process of law, this court has held, does not require the State to adopt any particular form of procedure, *so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Roger v. Peck, 199 U. S. 425, 435,* and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment *deprived the accused of any substantial right or in any wise changed the course of trial to his disadvantage.* All requirements of due process of law in criminal trials in a State, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court."

The case of *Crain* v. *United States, 162 U. S. 625*, was then considered, and the opinion continues:

"If a legal trial cannot be had without a plea to the indictment duly entered of record before trial, it would follow that such omission in the present case requires a reversal of the judgment of conviction, because the prisoner has been deprived of due process of law."

Appellee's Cases Distinguished.

While, in *Hurtado* v. *California*, it was declared to be within the power of the State to abolish the grand jury, and in *Maxwell* v. *Dow*, that it was within its power to abolish the petit jury, it by no means follows that one accused of crime in a State which has preserved these ancient institutions, may, without an indictment be tried before a judge without a jury, and be said thereby to be accorded due process of law. Nor would he in such a State, if tried before a common law jury, in accordance with the mode of procedure prevailing therein, be condemned by due process of law, if he were not permitted to be present on the trial, or if his presence were permitted during a part of the trial only. In the latter instance, he would be deprived of the hearing, or opportunity to be heard, without which due process is inconceivable. In other words, whatever the tribunal may be which is to pass upon his guilt or innocence he is deprived of due process unless he is enabled to defend himself before that tribunal, and to avail himself of his right to be heard, in such manner as is adapted to the nature and character of that tribunal and its modes of proce-

dure consonant with the ordinary principles of liberty and justice.

Allen v. *Georgia* related merely to a hearing on appeal after conviction. The right to appeal has never been regarded as a fundamental right. Moreover, Allen had lost the right to prosecute his appeal by his voluntary act. The distinction between a case like the present and *Allen* vs. *Georgia* was concisely stated by Mr. Justice White in *Hovey* vs. *Elliott, 167 U. S. 443,* as "between the inherent right of defence secured by the due process of law clause of the constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal."

Simon v. *Craft* was not a criminal case. It related to proceedings against one *non compos mentis,* who was given the right to a hearing but apparently did not avail herself of that right, and who was represented in the proceedings by a guardian *ad litem.*

Twining v. *New Jersey* related merely to immunity from self-crimination, which was shown by historical research not to be inherent in due process; and in that respect was distinguished from *Hovey* v. *Elliott, Scott* v. *McNeal* and *Londoner* v. *Denver,* which declared that the right to be heard constituted a fundamental prerequisite to due process of law.

Hammond Packing Co. v. *Arkansas* merely involved a rule of evidence which created a legal presumption, preservative rather than destructive of due process.

In *Jordan* v. *Massachusetts* and *Garland* v. *Washington,* there was not the slightest interfer-

ence with the right of the accused to be heard. In fact, in both cases, there was shown to have been a full and fair hearing.

Here, however, as the record unmistakably shows, the appellant was denied the right to be heard, not with his consent or approval, not because of his voluntary act, but by reason of the active and affirmative intervention of the court, which coerced his counsel, not only to consent without authority that the appellant should not be present at the rendition of the verdict, but also that the counsel should absent themselves at that time, by inspiring the fear that if the accused or his counsel were present in court at the reception of the verdict, and the jury should either acquit him or disagree, their lives would be imperiled by the hostile mob, which the presiding judge confessed himself to be unable to quell or to control, and which, in consequence, dominated the trial and paralyzed the orderly processes of law.

Ong Chang Wing v. *United States, 218 U. S. 280.*

The Right of the Accused to be Present at Every Stage of his Trial Essential to The Right to be Heard.

The constitutional right or opportunity to be heard, is not to be treated literally. It is not confined to the mere right of one accused of crime to appear in court and make a statement of his defense. It comprehends the right to defend, in person and by counsel, in the fullest sense of the term; to aid in the selection of the jurors; to hear

the allegations and proofs of the prosecution; to interrogate witnesses; to adduce testimony; to hear the rulings and instructions of the court; to see, and to be seen by, the jury, not while merely flitting in and out of the court-room, but during the entire proceedings. If he may be involuntarily kept out of or removed from the court-room at the last stage of the trial, it may be done at any other or at all othe rstages of the trial—during the selection of the jurors, the taking of testimony, the argument, or the charge. It is impossible to draw a line as to when his enforced absence would be either permissible or not allowable. The law has no way of determining at what moment of the trial his presence may be imperatively necessary for his protection, and has no way of knowing to what degree he has been injured, or what opportunities of defense he may have lost by his absence. Hence the only safe rule is to render his presence at every stage indispensable.

The law simply cannot permit any infraction whatever, be it of apparent consequence or not, of the defendant's right to be present at every moment of the trial. In a criminal case, where a prisoner is not required to become a witness, or in some jurisdictions, as in Georgia, where he cannot become a witness in his own behalf, but is merely permitted to make a statement "which shall not be under oath", (Penal Code, §§1036, 1037), he is nevertheless in evidence from the beginning to the end of the trial. His demeanor and conduct, his equanimity or excitement, his mere presence, constitute potent factors in the hearing, or opportunity to be heard, to which he is entitled under the Constitution. His personality speaks for him continuously. Who can say when

the decisive impression is made on the minds of those who sit in judgment? A jury may be, as it often has been, inclined in favor of the accused at the final moment of the trial, at the very instant when the verdict is to be pronounced, by his actions, which, to use a familiar and psychologically accurate phrase, often speak louder than words. It has been known that, even at that supreme period when the jury and the accused are brought face to face, a verdict of guilty agreed upon in the jury room, in the absence of the prisoner, has been withheld in his presence, and one of acquittal rendered. It is one thing to condemn a man *in absentia*. It is another, to look into his countenance and to declare his doom.

In *Nolan* v. *State, 55 Ga. 522,* Mr. Justice Bleckley refers to such a case:

"Many years ago, in the County of Fayette, I witnessed the polling of a jury on the return of a verdict of guilty, where the eleven jurors first called declared the verdict to be theirs, and only the twelfth man disowned it. The result was, that on considering the case, the whole twelve agreed to a verdict of not guilty, and the prisoner was acquitted."

This thought is also expressed with great felicity by Chief Justice Gibson in *Prine* v. *Commonwealth, 18 Pa. St. 103,* in language which was cited with approval by Mr. Justice Shiras in *Lewis* v. *United States, 146 U. S. 372*:

"It would be contrary to the dictates of humanity to let him (the accused) waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."

In other words, the hearing or opportunity to be heard to which a defendant, especially in a capital case, is entitled, continues down to the very moment when the jury is actually discharged. This opportunity to be looked at by the jury is, in such a case, an opportunity to be heard, and may prove a most effective hearing. The human element continues to operate. The accused is a reality and not a mere abstraction. The eyes of the jury serve as the means of conveying to their minds an impression often more convincing than that which is borne through their ears. The accused is engaged in testifying to his guilt or innocence, to an intelligent observer, during every moment of his trial, even though he remain silent.

In *Rex* v. *Ladsingham, Sir T. Raym, 193,* it was quaintly said:

"Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time."

Emphasis is also laid in various of the authorities on the fact that, "at the rendition of the verdict, the prisoner is entitled to have the jury polled, so that each one shall answer on his own responsibility, *face to face with the prisoner,* as to his guilt or innocence."

Dunn v. *Commonwealth, 6 Pa. St. 384.*
Temple v. *Commonwealth, 14 Bush, Ky., 769.*
Nolan v. *State, 55 Ga. 522.*

The importance of observing the demeanor of the accused by the jury, is exemplified in *Rhodes* v. *State, 128 Ind. 189, s. c. 27 N. E. Rep. 866,* where a new trial was granted to a convicted defendant upon proof that the eyesight of one of the jurors was so defective that he was unable to distinguish one from another of the faces of the witnesses.

2 Moore on Facts, §§991-995.

Section 5732 of the Code of Georgia of 1910 recognizes the importance in the determination by a jury of an issue submitted to it, that it shall consider among other things "all the facts and circumstances of the case, *the witnesses' manner of testifying,* their intelligence" etc.

It is also conceivable, that before the verdict was rendered the accused might have asked the Court, and have been granted an opportunity to address the jury, or to make a forgotten or newly conceived suggestion bearing upon his defense, which might have exerted a controlling influence upon the minds of the jurors, or of some one of them; or he might have moved for a mistrial or made other appropriate motions.

The Right of the Accused to be Present at the Reception of the Verdict.

In the light of these elementary considerations, it becomes important to ponder the authorities which, with remarkable unanimity, have laid down the rule, that the reception of a verdict against one accused of a felony, in his absence and without his consent, he being at the time confined in

jail, is a nullity. In the Appendix printed at the end of the argument, is to be found a collation of all the decisions bearing on this subject, which we have been enabled to discover after a careful search. The decisions of this Court will be presently discussed. Where the name of any State does not appear in the list, it is because no decision is found in its reports dealing with the question. The States included are Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin. There is also a decision by the United States Court of Claims, and excerpts from various text writers and common law authorities follow.

From this array of authority, there is but one conclusion to be drawn, namely, that one accused of a capital offense may not be tried in his absence, and that a verdict received while he is incarcerated in jail, and all proceedings based thereon, are *coram non judice* and absolute nullities.

In *Cooley's Constitutional Limitations, Second Edition, §452,* that distinguished author says:

"In cases of felony, where the prisoner's life or liberty is imperiled, he has the right to be present and must be present, during the whole of the trial and until the final judgment. If he be absent, either in prison or by escape, *there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment.*"

In *McGehee on Due Process, pp. 164, 165, 168,* the author says:

"In criminal trials certain matters pertaining to procedure have been declared to involve fundamental rights, of which the person accused of crime may not be deprived without the denial of due process of law, while others are matters of form only. Generally, whatever matters are jurisdictional are essential and protected by the Constitution; matters which do not affect the competency of the court are not jurisdictional and are not protected. * * * So, also, under the same provision, (Fifth Amendment), the right of a person accused of felony, TO be present during the whole of the trial, in the trial court, is a substantive right of which he cannot be deprived without due process of law, even with his consent."

Attention is also directed to the discussion of this subject in *1 Bishop's New Criminal Procedure, Edition 1913, §§265-274.*

The Georgia Decisions.

The decisions of Georgia bearing upon this point are clear and outspoken, and with one accord recognize the applicability of this principle to circumstances precisely like those detailed in the present record. In fact the Supreme Court of Georgia, in the opinion rendered on the denial of the appellant's motion to set aside the verdict rendered against him, in so many words announced that "it is the right of a defendant on trial for crime in this State to be present at every stage of his trial, and to be tried according to established procedure."

Although all of the Georgia decisions are to be found in the Appendix, we deem it desirable at this time to call attention to a number of the more important ones.

In *Nolan* vs. *State, 53 Ga. 137,* the defendant had been indicted for murder, and the jury returned a verdict finding him guilty of voluntary manslaughter, the verdict being rendered in his absence. A motion in arrest of judgment was made on that ground, and was held not to be the proper method for raising the question sought to be presented, and the judgment was affirmed. The Court, however, pointed out that the proper remedy was by motion to set aside the verdict, because the defendant's absence when the verdict was rendered was a fact extrinsic of the record. Chief Justice Warner concisely declared:

"That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court."

After this affirmance of the conviction of Nolan by the Supreme Court, a motion was made in the court of first instance, to set aside the verdict on the ground that it had been rendered and published in his absence, and the motion was granted. The effect of granting this motion was subsequently considered in *Nolan* vs. *State, 55 Ga. 522.* In the course of his opinion, Mr. Justice Bleckley said:

"The error of receiving a formal verdict in the prisoner's absence would be nothing if the

jury had been retained in the box and required to render a valid one in his presence. The mischief was done by discharging the jury without any legal necessity, and without obtaining from it something that the law could recognize as a verdict. The prisoner was once fully in the power of that jury, and he had a right to such a verdict, *as each several juror could avow before his face.*"

In *Bonner* vs. *State, 67 Ga. 510,* Chief Justice Jackson said:

"The presence of the prisoner is necessary to his legal trial from the beginning to the end of that trial before the jury. *12 Ga. 25.* And such was the rule and practice at common law. *Wharton's Crim. Plead & Prac. 540a, 545, 546, 549, 550.*"

In *Barton* v. *State, 67 Ga. 653,* Chief Justice Jackson said:

"It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial—*especially at the rendition of the verdict,* and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. *Nolan* v. *State, 53 Ga. 137; Ib. 55, 521.* The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into court by its order."

This language was quoted with approval in *Diaz v. United States, 223 U. S. 456.*

In *Bagwell* v. *State, 129 Ga. 170, s. c. 58 S. E. Rep. 650,* which was also a conviction of murder,

it appeared that, after the case had been submitted to the jury, the court, without the defendant's consent and in his absence, he being at the time confined in jail, and in the absence of his counsel, discharged the jury without a verdict on the ground of their inability to agree. The validity of this act as applicable to a subsequent trial, was presented on a review of a judgment of conviction. In the course of its opinion the court said:

"It has been frequently held by this court that it is the right of the accused charged with a felony to be present at every stage of his trial, including his arraignment or waiver thereof (*Wells* v. *Terrell, 121 Ga. 368, s. c. 49 S. E. 319*), reading to the jury notes of the evidence taken by the court (*Wade* v. *State, 12 Ga. 25*), the argument of counsel for the State (*Tiller v. State, 96 Ga. 430, 23 S. E. 825*), during the charge of the court (*Hopson* v. *State, 115 Ga. 90, 42 S. E. 412*), and at the *rendition of the verdict* (*Nolan* v. *State, 53 Ga. 137, 55 Ga. 521, 21 Am. Rep. 281; Barton* v. *State, 67 Ga. 653, 44 Am. Rep. 743*)."

In *Cawthon* v. *State, 119 Ga. 395, s. c. 46 S. E. Rep. 897,* Mr. Justice Cobb said:

"Where the accused is in custody, and does not consent that the verdict shall be received in his absence, the reception of the verdict while he is thus involuntarily absent will render the same illegal. *Nolan* v. *State, 53 Ga. 137, s. c. 55 Ga. 521; Rose* v. *State, 20 Ohio, 31; People* v. *Perkins, 1 Wend. 91; State* v. *Ford, 31 La. Ann. 311.*"

In *Lyons* v. *State, 7 Ga. App. 50, s. c. 66 S. E. Rep. 149,* the defendant had been convicted of a felony, the verdict being rendered while he was absent in jail. An order denying his application to set aside the verdict was entered, but on ap-

peal was reversed. Chief Judge Hill, after citing with approval the opinions in *Nolan* v. *State* and *Barton* v. *State, supra,* said:

"It cannot be questioned that the defendant had a right to be present during the whole of the trial and until the rendition of the verdict. This is a right so clearly and generally established that we deem it unnecessary to cite any authority. In some jurisdictions it is held that this right is limited to cases of felony, but the Penal Code of this State makes no distinction in this respect between felonies and misdemeanors. The accused has the right in all criminal cases to be present during the entire trial, not only in person, but also by his counsel. *Const. Ga. art 1, §1, par. 4.* 'The presence of the counsel was no substitute for that of the man on trial. Both should have been present.' *Bonner* v. *State, 67 Ga. 510; Martin* v. *State, 51 Ga. 567; Wilson* v. *State, 87 Ga. 584, 13 S. E. 566.* 'The great point is that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done with the case.' *Bagwell* v. *State, 129 Ga. 172, 58 S. E. 650.*"

There is thus an unbroken line of authority in Georgia, which announces, in unqualified terms, the rule making the presence of a defendant charged with felony, at the time of the rendition of a verdict against him, where he is in the custody of the court at the time of the trial, a prerequisite to a legal trial.

The Decisions of this Court.

This doctrine is clearly recognized by the decisions of this Court, and has been applied under conditions identical in character with those existing here.

Thus, in *Hopt* vs. *Utah, 110 U. S. 574*, it was held that the trial of challenges to proposed jurors in felony cases, by triers appointed by the court, must be had in the presence of the accused as well as of the court; and that the presence of the accused cannot be dispensed with. Mr. Justice Harlan said:

"The prisoner is entitled to an impartial jury composed of persons not disqualified by statute and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defence may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins."

And we may add that, necessarily, that right to be present only ends when the verdict of the jury has been rendered.

That part of the opinion which deals with this proposition, concludes as follows:

"Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for a felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. *If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.*"

In *Ball* v. *United States, 140 U. S. 118,* Chief Justice Fuller said:

"At common law no judgment for corporal punishment could be pronounced against a man in his absence, and in all capital felonies it was essential that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced."

In *Schwab* vs. *Berggren, 143 U. S. 442, 448,* the defendants were convicted of murder in the State Court of Illinois. An appeal was taken to the Supreme Court, where there was an affirmance. The defendants were not present upon the affirmance of the judgment, and it was claimed that this fact brought the case within the principle requiring the presence of a prisoner at every stage of the trial. A writ of habeas corpus was sued in the United States Circuit Court to procure the defendant's discharge because of their absence from the appellate tribunal at the time of the announcement of its decision. A demurrer to the petition was sustained, and the case was then brought here. Although this Court held that the rule relating to the presence in court of one accused did not require his presence at the time of the affirmance of his conviction on appeal, the principle for which we here contend was nevertheless emphatically recognized by Mr. Justice Harlan, who said (p. 448):

"The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

In *Lewis* vs. *United States, 146 U. S., 370,* it was held to be error to permit challenges to be made to jurors whose names appeared on the jury lists, in the absence of the defendant. Mr. Justice Shiras, speaking for the Court, said:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

The point made was that the accused had been required to challenge the jury from a list, and without an opportunity of first seeing the jurors face to face.

Dealing with this proposition the opinion continues:

"Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed."

In *Dowdell* vs. *United States, 221 U. S. 331,* Mr. Justice Day said:

"In *Hopt* v. *Utah, 110 U. S. 574,* this court held that due process of law required the accused to be present at every stage of the trial."

In *Diaz* vs. *United States, 223 U. S. 442, 455,* speaking of the necessity for the presence at every stage of the trial of a defendant on trial for felony, who is not at large on bail, Mr. Justice Van Devanter said:

"In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury *and the reception of the verdict,* and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction."

The opinion then quotes at length from that of the Supreme Court of Georgia in *Barton* vs. *State, supra,* the passage which we have above quoted.

In this connection, we refer to *Hibben* vs. *Smith, 191 U. S. 310,* where it was held that the due process clause of the Fourteenth Amendment places the same inhibition on the States as does the Fifth Amendment upon the Federal Government. This makes the decisions of this Court, above quoted, especially important in the present case.

See also *French* vs. *Barber Asphalt Paving Co., 181 U. S. 324.*

In *Maurer* vs. *The People, 43 N. Y. 1,* a conviction was reversed where, on a trial for murder,

after the jury had retired to deliberate on its verdict, it returned into court and asked certain questions as to what had been the evidence on particular points, to which the court gave the information requested in the presence of the prisoner's counsel, the prisoner being absent. It was held that this was a proceeding upon the trial, and the prisoner not being present, the action of the Court was illegal. Judge Grover said:

"The clause, 'during such trial,' as used in the statute [a mere codification of the common law]. includes all proceedings had in empaneling the jury, the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, receiving and recording the verdict. In all these proceedings, the legislature has deemed the presence of the accused essential to the attainment of justice and the protection of the innocent. The charge of the court to the jury includes all instructions of the court to the jury upon points of law, and all comments upon the evidence. Those familiar with trials for crime must be aware that the presence of the accused is quite as necessary and important to him during the latter as the former."

II.

Not only was the appellant deprived of due process of law, because he was by the action of the court, kept out of the court-room when the verdict was rendered, but the entire proceedings became coram non judice, because of mob domination, to which the presiding judge succumbed and which in effect wrought a dissolution of the Court.

In his petition the appellant avers (*Rec. p. 8*):

"My trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to me, and whose conduct intimidated the court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and for that reason also I was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, the protection of which I expressly invoke."

The petition shows throughout, that the crowds which gathered, both within and without the court room, were boisterous, were inimical to the appellant and his counsel, and gave evidence of intense partisanship in favor of the prosecution, to such a degree that the presiding judge became thoroughly alarmed, and, in the presence of the jury, conferred with the Chief of Police of Atlanta and the Colonel of the Fifth Regiment stationed there, who were well known to the jury.

The public press of Atlanta as well, apprehending danger on the Saturday preceding the submission of the case to the jury, if the trial continued on that day, united in a request to the court that the proceedings should not continue on Saturday evening. Although this request was heeded and the trial was adjourned until the following Monday, public excitement did not subside, but continued as intense as it had previously been.

Instead of quelling the outbursts of the mob, or seeking to control its demonstrations, or asserting the judicial power and enabling justice to pursue its uninterrupted sway, the Court surrendered and abdicated its functions, and temporized with those whose lawlessness defied the duly constituted authorities, at the decisive moments of the trial, and permitted itself to be coerced, by ominous threats of prejudice and by the terrors of violence, into denying one of the most substantial and elementary rights of the man whose steadfast insistence on his innocence had inflamed the hostile passions of his enemies. What the court did at this important moment, which meant life or death to the accused, was a judicial admission that the administration of justice had broken down, that its proceedings were controlled by the mob, that it was powerless to protect the man on trial in his legal rights, and that fear of its action hovered like an evil spell over the tribunal which was to hear and decide his guilt or innocence without the intervention of unauthorized participants.

Thus influenced by considerations irreconcilable and inconsistent with due process of law, with the avowed purpose of avoiding an outburst from the dominating mob which might result in

the murder of the prisoner at the bar and of his counsel, in the very sanctuary of the law, entitled though they there were to its protection, the Court drove them forth from the forum where they were struggling for the appellants' life and left it in the unrestrained possession of the prosecution, and of those who came to desecrate the temple of justice, to exercise upon the jury the same constraint that they had successfully brought to bear upon the court.

The trial to which the appellant was entitled, as part of that due process which was guaranteed to him by the Constitution, was a fair trial. As was well said by Judge Vann in *People* v. *Wolf, 183 N. Y. 472*:

"An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. * * * A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law."

Here, the trial was permitted to degenerate into a judicial lynching, when the mob triumphantly intervened and was permitted to control and dominate the instrumentalities of juridical procedure, to terrify the Court itself, and neutralize the judicial function. There was no longer a court or a jury. They were as though they had never been. There ceased to be a trial or a hearing, or an opportunity to be heard. For all practical purposes, the court might as well have handed the appellant over to the tender mercies of the boisterous bystanders who were clamoring for his blood, as to proceed with the formality of a

trial which ceased to be an inquiry into the appellant's guilt, and became a mere plaything of unrestrained lawlessness.

It is true that neither the court nor the jury was physically attacked, but it is impossible to believe, from the facts which stand uncontradicted on the record, that the jury was not made to feel that its only function was to register the will of the mob. When the jurors returned into the court room, and found the prisoner absent, and his counsel absent, with none to look into their faces but the excited multitude, and when, after the first juror had been polled, the tumult of applause and the cheers that were bellowed were so resounding as to prevent the responses of the jurors as they were polled, from being heard ten feet away, is it possible to believe that these jurors acted as free moral agents, or that they were not subjected to a species of duress that swept from their minds every thought save that of personal jeopardy?

A trial amid such concomitants, is a mere travesty. It is not a legal proceeding. It is not conducted in a tribunal in which justice is administered in a secure and orderly manner, free from external coercive influences, calmly, soberly, without fear or favor, without passion or prejudice. It is rather a tribunal where law has been dethroned, where terror reigns, and where fear sits trembling on the judgment seat.

A fair trial is universally recognized as one of the conditions without which due process of law cannot exist.

5 Cyc. of U. S. Sup. Ct. Rep., 618, and cases cited.

The effect of demonstrations by a mob and the fear engendered thereby in the mind of a court, and their influence on a jury, in criminal cases, is discussed with great force, and remarkable relevancy to the present case, in the following authorities, which show that a trial which is not fair and impartial, which is dominated by a mob, is not a legal proceeding, but a mere mockery:

In *Massey* v. *State, 31 Tex. Cr. Rep. 371, s. c. 20 S. W. Rep. 758,* a negro was tried on an indictment for rape upon a white woman. It was claimed that he had been deprived of a fair and impartial trial by the presence of a mob in the court room. One of the defendant's counsel, appointed by the court, applied for a change of venue. The court refused the application, for the reason "that it would at once precipitate an attack upon the jail, which he desired to avoid." There was a conviction, which was set aside, the court declaring that to decide that a trial under such circumstances was fair, impartial and legal, would be a travesty on decency, law, common sense and justice, notwithstanding that good men may have tried the prisoner. In the course of the opinion the court made use of the following language, the application of which to the present case is unmistakable:

"Appellant was not present when the verdict was reached and returned into court. But the state replies that he waived this right. He did; but under what circumstances was this so-called waiver made? 'While the jury were out, considering of their verdict, the honorable district judge who tried the case advised defendant's counsel to have defendant to waive his right to be present at the reading of the verdict, as under the circum-

stances it was best to have him safely in jail. The county attorney then wrote out a waiver, which defendant's attorney brought to the jail, and defendant signed it. Neither the honorable judge nor the county attorney denies these things, nor is there any explanation of this matter. Why was it best to have defendant safely in jail? What were the circumstances which rendered it best to have him safely in jail? The answer to these questions is evident. The spirit, if not the presence, of that same howling, threatening, tumultuous, blood-thirsty mob, had overawed justice, dominated the court, and thus deprived the appellant of the right to be present in court when the issue of his life or death was being settled. Did the appellant waive his right to be present when the jury returned their verdict? He did not. This so-called waiver was forced upon him. He was compelled to make it, or take the risk of being hung by the mob in the event the jury failed to hang him. It would be an insult to law, justice and common sense to submit an argument or cite authorities to prove that the act of appellant, called a 'waiver,' was not such as would be binding upon him. Appellant had a right to a fair and impartial trial, which was denied him by a mob. He had a right to be present in court. It was his court, the court of every citizen of this state. Its portals must be kept open, and no mob has a right to close them against a citizen who is being tried for his life, liberty, or property. He was deprived of this right by a mob, and not by the court; for the writer is impressed by this record with the belief that the ruling of the court in regard to the change of venue and motion for a new trial was made to save defendant from the vengeance of the mob. But it is contended that the mob, when the verdict was returned had dispersed; that in fact there was no danger to appellant. *The honorable judge did not so view the situation, or he would not have requested the waiver.*"

In *State v. Welden, 91 S. C. 29, s. c. 39 L. R. A., N. S. 667,* it was held that a conviction of murder would be set aside where the court room was filled with a hostile crowd, who threatened to lynch the prisoner, so that the counsel called upon to defend him did not dare to ask for the customary time for preparation, and the space about the judge, counsel and witnesses was so filled with people that counsel for the accused could not see the witnesses, and failed to see the jury until he arose to address them. In the course of the opinion Mr. Justice Woods said:

"An immense number of people assembled at the trial intensely hostile to the accused, and crowded the courthouse. The defendants being without counsel, the presiding judge sent for Mr. W. F. Clayton and requested him to undertake their defense. On his way to the court through the dense crowd, Mr. Clayton 'heard expression in regard to lynching' which convinced him that, if he should ask for the three days of preparation allowed by law, the prisoners would be lynched, and under the compulsion of this fear he gave up that most vital right, and went immediately into the trial without preparation. That the danger of mob violence was present and imminent is made further manifest by the statements of Mr. Lucien W. McLemore and the stenographer of the court, Mr. F. F. Covington, both witnesses of high character. Not a particle of evidence was offered by the state to controvert this showing. The presiding judge, it is true, says that the crowd was quiet, and that it manifested no mob spirit to his eye nor in his hearing; but this statement does not impair the force of the testimony of those who mingled with people, and thus had better opportunity to observe. Thus it appears, beyond all doubt, that the circumstances of the trial were such that counsel of experience and courage *gave up, under the most urgent compulsion, the right*

to three days' preparation guaranteed to the accused by the law; and that, too, when he had been called into the case by the court without previous notice. Compulsion is sufficient to annul a will or a contract for the sale of property. How, then, can it be held that a trial involving life or death was fair and impartial, according to the law of the land, when the accused, under the compulsion of a reasonable apprehension of lawless violence, surrenders a right vital to his defense?

"In an opinion delivered by the distinguished Judge Elliott, the Supreme Court of Indiana, under circumstances very similar to those appearing here, set aside for compulsion a plea of guilty, which defendant's counsel showed to the court had been entered, by their advice, on the reasonable apprehension that if their client should be acquitted he would be lynched. *Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29.*"

In *Sanders v. State, 85 Ind. 319,* a judgment entered on a plea of guilty, interposed by one accused of murder on the advice of his counsel, who believed at the time that it was the only way in which his life might be saved from the imminent danger of mob violence, was vacated, Mr. Justice Elliott most pertinently saying:

"There were strong reasons in support of the appellant's prayer. All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence. It is almost mockery to call that a trial, or a judicial hearing, which condemns an accused upon a plea of guilty forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with a trial upon a plea of not guilty would result in the hanging of their client by lawless men. A man who makes a promisory note because of fear is

entitled to relief. A man who executes a deed under duress is entitled to judicial assistance. A will executed under the influence of fear falls before the law. These are small things when compared with life and liberty, and yet in the eyes of the law they are null. If such things are null when procured by fear, or extorted by violence, should not a plea be so, when to have refused it would have been to put in jeopardy the life of the man arraigned upon a charge of felony? In many respects the facts of this case go far beyond that of ordinary cases of duress, for here the officers of the law, judge, sheriffs and jailers were inspired with fear of violence; counsel of age and experience, influenced by the appearances of danger that surrounded their client, secured from him a reluctant acquiescence to the plea of guilty."

See also

People v. *Fleming, 136 Pac. Rep. 291.*
Myers v. *State, 97 Ga. 76.*
Collier v. *State, 115 Ga. 803, 42 S. E. Rep. 226.*

The remarks of Mr. Justice Holmes, in the opinion rendered by him on the denial of the appellant's application for a writ of error to the Supreme Court of Georgia (*Rec., p. 13*), are the natural expression of protest against the proceedings by means of which the appellant is sought to be deprived of his life:

"I understand that I am to assume that the allegations of fact in the motion to set aside are true. On those facts I very seriously doubt if the petitioner has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, though by the

presiding judge to be ready for violence unless a verdict of guilty was rendered."

The language of Judge Jones in *Ex parte Riggins, 134 Fed. Rep. 404,* which is quoted at length under Point I (*pp. 36 to 40, supra*), is applicable here, in its full vigor. These words, however, are worthy of repetition in this connection:

"No one can deny that, under the Constitution, it is the prisoner's right to enjoy the workings of such due process, and that it is the duty of the State, under the Fourteenth Amendment, to dispense such justice to him. These rights cannot be enjoyed, or the duty enjoined upon the State discharged, except from the undisturbed workings of the machinery of justice after its power has once been put in motion, until the period arrives in the particular case where it may rightly stop. Until it has done its perfect work, the administration of due process, which in a case like this cannot be enjoyed except by the regular and orderly working of judicial procedure, is not afforded by the State."

The abdication by a court of its powers, whether voluntarily or involuntarily, operates as a dissolution of the court.

In *Ellerbee v. State, 75 Miss. 522, s. c. 41 L. R. A. 569,* it was held that the temporary relinquishment by a judge of his functions, on a trial for felony, by departing from the court room, leaving a member of the bar presiding in his absence, which lasted about twenty minutes, during which the trial proceeded, amounted to a dissolution of the court, which rendered the trial a nullity.

To the same effect are the decisions in

Blend v. People, 41 N. Y. 604.
People v. Shaw, 3 Hun, 272; aff'd. 63 N. Y. 36.
Hinman v. People, 13 Hun, 266.
Hayes v. Georgia, 58 Ga. 35.
O'Brien v. People, 17 Col. 561.
McClure v. State, 77 Ind. 287.

A court is no more deprived of jurisdiction, by the fact that the presiding judge absents himself physically, than by the fact that he surrenders his control over the judicial proceedings pending before him, to a mob, although he be physically present.

As said in *Pennoyer* v. *Neff, 95 U. S. 714,* to give legal proceedings any validity, "*there must be a competent tribunal* to pass upon their subject-matter." How can it be said that there is "a competent tribunal," where the established instrumentality of justice has lost control over its proceedings? If the mob had driven Judge Roon from the bench, its domination of the proceedings would have been no more complete, than it in fact was when fear of it overthrew the judicial faculty.

The absence of the appellant at the time of the rendition of the verdict, was symptomatic of the conditions which prevailed during the entire trial, and which culminated in the conclusion by the court, that his life and the lives of his counsel were in extreme jeopardy from mob violence. It was this condition which induced the trial judge to insist upon a waiver on behalf of the prisoner of his right to be present, and which led him to induce appellant's counsel to avoid the conse-

quences of a hostile demonstration from a dangerous crowd, "ready for violence unless a verdict of guilty was rendered."

In *United States* v. *Shipp, 203 U. S. 563,* Johnson, a negro, had been convicted of rape in the State court of Tennessee, and sentenced to death. He presented to the United States Circuit Court his petition for a writ of habeas corpus, which was denied. He then appealed to this Court, and an order staying proceedings was issued. Before the appeal was argued, a mob broke into the jail at Chattanooga and hung him. Proceedings to punish the sheriff and others for contempt then followed. It was urged that this Court had no jurisdiction of the appeal, because the cause did not involve a violation of any rights secured to the prisoner under the Constitution of the United States. The petition for the writ of habeas corpus alleged, that negroes were excluded illegally from the grand and petit juries, that the prisoner's counsel was deterred from pleading this fact or of challenging the array, or asking for a change of venue, or a continuance, or moving for a new trial, or for an appeal, from fear of mob violence. Mr. Justice Holmes, speaking for this Court, said:

"We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. . . . We shall say no more than that it does not appear to us clear that the subject-matter of the petition was beyond the jurisdiction of the Circuit Court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied."

III.

The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one which neither he nor his counsel could waive or abjure.

The record shows beyond a doubt, that Frank did not know that his counsel were requested by the Court to waive his presence at the time of the rendition of the verdict, or that they had in fact agreed that he should not be present, and that he did not in fact learn of this arrangement until after the verdict had been rendered, the jury discharged and the sentence of death pronounced upon him. It is also shown that he had never authorized his attorneys or any other person to waive his appearance at the time of the rendition of the verdict, or to waive their own presence at that time, and that he did not know until after he had been sentenced to death that the verdict convicting him of murder had been received in the absence of his counsel, and that they were not present when the jury was polled by the Court. It is not even intimated in the record that it was agreed on his behalf that the jury should be polled. The statement to that effect in the opinion of Supreme Court of Georgia (*Rec. p.*) is unwarranted.

The facts discussed under Point II stand admitted, and demonstrate that when appellant's counsel complied with the request of the Court,

that neither they nor their client should be present when the verdict should be received, they were under duress.

The question therefore arises, whether the attempted waiver of his presence by his counsel is for any purpose effective, when he was not voluntarily absent, when he was not at large on bail, but was in the actual custody of the court, and when it is shown that he did not personally waive the right to be present, and did not authorize his counsel to make such waiver. We contend not only that, under the circumstances of this case, there was no waiver, but also that there could be none, both for the reason discussed under the foregoing Point, but for the additional ones, now to be considered.

Georgia Decisions.

Here, again, the decisions of Georgia speak in the most conclusive terms.

In *Barton* vs. *State, 67 Ga. 653,* a distinction was made between the case of a prisoner in custody and one who was out on bail and absent when the verdict was rendered. After laying down the rule contained in the passage from this opinion above quoted, and adopted by this Court in *Diaz* vs. *United States,* Chief Justice Jackson continued:

"But the case is quite different, when after being present during the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room where he and his bail obligated themselves that he should be. This difference is plainly indicated by the ruling in the Nolan case in the fifty-fifth Geor-

gia, and the opinion of the court delivered in that case by Judge Bleckley. And the absolute necessity of the distinction, for the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered. * * * It ought not to be, because it would put it in the power of defendants on bail to block their conviction for felonies forever; it cannot be because the very object of all criminal law is punishment for crime, and without verdicts there can be no punishment for crime."

In *Robson* vs. *State, 83 Ga. 171,* Chief Justice Bleckley said:

"When the verdict was brought into court the accused was at large on bond, and was voluntarily absent. His counsel being present consented to the reception and publication of the verdict. We see not why the voluntary absence alone would not be good cause for proceding with this necessary step in the trial. Barton *vs.* State, 67 Ga. 653. It was the privilege of the accused to be present, but its exercise rested upon his will alone. *He was under no restraint or constraint by the action of the court.*"

In *Cawthon* vs. *State, supra,* the assignment of error contained in the bill of exceptions was worded in the following language:

"After the evidence, statement of prisoner, the argument of counsel, and the charge of the court had been concluded, and while the jury were out considering their verdict in the case, the presiding Judge, with the consent of the defendant's counsel, and in the interest of the safety of the prisoner and the preservation of order, sent the defendant back to jail, and the verdict finding him guilty of murder was received in the absence of the

prisoner, who was in jail under this charge, and could not control his own movements; and such reception of the verdict in the absence of the defendant, being also with the consent of defendant's counsel, who stated that they would take no exception thereto, and in the interest of the prisoner's safety and of the preservation of order. The defendant excepts to the receiving of the verdict finding him guilty of murder in his absence, as being illegal and in violation of his constitutional and statutory right to be present in the court room when the verdict was received, and says that his counsel, though acting in the most perfect good faith and in the interest of his personal safety, had no legal authority to waive his right to be present, and he says that for this reason the verdict in this case and the sentence based on said verdict should be held to be illegal and set aside."

Mr. Justice Cobb, after conceding the general principle to be, as shown by the excerpt from his opinion already quoted, added, that it had been settled in Georgia that the voluntary absence of the accused at the time of the reception of the verdict would not vitiate the verdict, and expressed it to be his individual view that the accused may himself waive his right to be present. The opinion proceeds:

"The open question in this State is whether his counsel can make the waiver for him. There is an intimation in Robson *vs.* State, 83 Ga. 167, 9 S. E. 610, that counsel might make an express waiver; but the point was not directly involved. * * * The weight of authority in other jurisdictions seems, however, to be that counsel cannot waive the right of the accused to be present. See *Rex* vs. *Streak, 2 Car. & P. 413; Fight* vs. *State, 28 Am. Dec. 630 (notes); State* vs. *Kelly, 97 N. C. 407, 2 S. E. 185,* and cases cited. * * * These decisions seem to draw no distinction between a

waiver made by counsel in the presence of his client and one made in his absence. While counsel may have no implied authority, growing out of the relation of attorney and client, to make a waiver of this character for his client in his absence, we can see no good reason why the accused would not be bound by an express waiver made in his presence. * * *

Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in the counsel, whether the accused be present or not at the time of the waiver; his authority arising from the mere relation of attorney and client. * * * But under the facts of this case it is not necessary for a direct ruling to be made upon this point, as, in our opinion, a waiver by counsel in the presence of the accused, unrepudiated by him at the time of the waiver, is so binding as to make valid any action of the court based thereon.''

In *Lyons* vs. *State, supra,* Chief Judge Hill, said:

''In some jurisdictions it has been held that this right of the defendant to be present during the trial and until the rendition of the verdict could not be waived at all, either by himself or by his counsel. But in this State the defendant can waive any right guaranteed to him by the law or the Constitution, and it has also been held that a defendant who is out on bond can constructively waive his right to be present at any stage of the trial. It is admitted in this case that the defendant was in jail, that he was not present when the verdict was rendered, and that he personally did not waive his right to be present. It is, however, contended that his counsel waived this right for him. Whether his counsel had the right to make any waiver of the defendant's presence is to the writer a very serious question. There is weighty authority for the statement that a waiver of this right must be the act of the accused himself, and

not that of his counsel. *People* vs. *Perkins, 1 Wend. 91; Rex.* vs. *Streak, 2 Car. & P. 413; Rose* vs. *State, 20 Ohio, 31; Young* vs. *State, 39 Ala. 357; Prine* vs. *Com. 18 Pa. 103.* In this last case the learned Chief Justice uses the following strong language: 'What authority had the prisoner's counsel in this case to waive the defendant's presence on the pretext of convenience? In a criminal case there is no warrant of attorney, actual or potential. It is unnecessary, however, to speak of delegated authority, for the right of a prisoner to be present at his trial is inherent and inalienable.'

"If it be said that counsel for the prisoner in this case had the right to waive his own presence at the rendition of the verdict, and also the right to waive the polling of the jury, can it be claimed that he had the right to do this much in the absence of his client, and without the express authority of his client to make such waiver? The prisoner had the right to have his attorney present at the rendition of the verdict. This it seems to me is a right which not the attorney, but the client alone, can waive. Of course, it is generally, the practice, where both counsel and client are present in court on the trial of criminal cases, for many important rights of the client to be waived by counsel. But we do not think that in the trial of a criminal case the waiver of an attorney of his right to be present at the rendition of the verdict is binding upon his client. The man on trial has not only the right to be present in person, but to have his counsel present."

Decisions of This Court.

This question has been most effectively considered by this Court.

Thus, in *Hopt* vs. *Utah, 110 U. S. 579,* Mr. Justice Harlan said:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense

with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, not by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. *The public has an interest in his life and liberty.* Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiration or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substituted rights may be affected by the proceedings against him. *If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.*"

This passage was cited with approval in *Schwab* vs. *Berggren, 143 U. S. 449;* and also in *Lewis* vs. *United States 146 U. S. 373,* where Mr. Justice Shiras, in support of the contention that the right

to be personally present during the trial cannot be waived in cases of felony, further said:

"'It would be contrary to the dictates of humanity to let him waive the advantage which a view of his said plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence.' *Prine* vs. *Commonwealth, 18 Pa. St. 103, 104,* per Gibson, C. J. And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact. Thus, in a Virginia case, *Hooker* vs. *Commonwealth, 13 Gratt. 763, 766,* the court observed that the record showed that, on two occasions during the trial, the prisoner appeared by attorney, and that there was nothing to show that he was personally present in court either day, and added, 'This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. * * * It is the right of any one, when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses,' and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected.' Thereupon the judgment was reversed. And in the case of *Dunn* vs. *Commonwealth, 6 Pa. St. 384,* it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears. *Ball* vs. *United States, 140 U. S. 118* is to the same effect."

In *Thompson* vs. *Utah, 170 U. S. 343,* a similar question arose *i. e.*, as to whether it was in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon his guilt, in-

stead of a constitutional jury of twelve. Dealing with this proposition, Mr. Justice Harlan said:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of *Hopt* vs. *Utah,* above cited, the question arose whether the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence."

The opinion then quotes at length the passage from *Hopt vs. Utah* which we have cited above.

In *Kepner* v. *United States, 195 U. S. 100, 135,* Mr. Justice Holmes, in a dissenting opinion in which Justices White and McKenna concurred, said:

"*In a capital case, like Hopt* v. *People, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights.. Thompson* v. *Utah, 170 U. S. 343, 353, 354.* Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

To the same effect are *Cancemi* vs. *People, 18 N. Y. 128*, and *Ball* vs. *United States, 140 U. S. 118*.

In the first of these cases, which is a leading authority in this country, it was decided that a prisoner on trial for a capital offense could not consent to be tried by a jury of eleven. The reasoning of Judge Strong, which has been frequently quoted, is very much in point here:

"The penalties or punishments, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law' (Const. art. 1, sec 6), when forfeited, as they may be, as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (vol. 4, 189) says: 'The king has an interest in the preservation of all his subjects.' And again (vol. 1, 133), that the 'natural life, being the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws. Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to vari-

ous matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But when issue is joined upon an indictment, the trial must be by the tribunal and the whole which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant. Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any member short of a full panel of twelve jurors, and we think it ought not to be tolerated."

To the same effect is, *Dickinson* vs. *United States, 159 Fed. Rep. 801.*

Two facts are to be emphasized in this aspect of the case:

1. The appellant was not at large on bail. He could not come and go as he pleased. The circumstances were not such as existed in *Diaz* vs. *U. S.* (*supra*), or in *Barton* vs. *State*, (*supra*). He was lodged in jail and was not a free moral agent. He could not act upon his own initiative, with respect to his attendance upon his trial. He could not even enter the court-room except with the permission and at the instance of the Court. Without the exercise of its volition that he should be present, his entire trial would have proceeded *in absentia*. His absence at the reception of the verdict, the polling of the jury, and its discharge was therefore the direct result of judicial action. In fact it was because of the positive request of the Court that his counsel, without authority, waived his presence to the extent desired. They might as well, on like request, have waived his presence during the entire trial. The legal situation and effect would have been precisely the same.

2. Not only was the appellant's absence involtary, so far as any act or consent of his was concerned, but the consent of his counsel was coerced by the action of the presiding judge, who yielded to the terror inspired by the mob, which dominated the trial, and who confessed his inability to withstand its anticipated violence. Their consent was, therefore, not only without authority express or implied, but was wrested from them by duress equivalent to the application of the thumb-screw and the rack. The authorities cited under Point II, as well as every principle of justice and humanity, condemn such an act as a nullity.

IV.

It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel.

In all of the cases cited under Point III (and many more might be added from various jurisdictions), the Courts proceeded on the theory that the right of the prisoner to be present at every stage of the trial, including the rendition of the verdict, was of such a nature as not only to concern him, but the public and the cause of justice as well, and that, however specific may be the terms of a waiver by one charged with a capital offense, who, at the time of his trial is incarcerated, such consent would be an absolute nullity. In some cases, particularly *Thompson* vs. *Utah, 170 U. S. 343,* it was said that it was not within the power of one so accused to consent to the withholding of his constitutional right either expressly or by his *silence.*

Ratification at most is merely the equivalent of prior authority. Authority from a principal to an agent cannot be more effective under the law than the act of the principal himself. Consequently, by ratifying the unauthorized act of an agent, the principal is merely doing an act which he might

have performed in the first instance. If, therefore he could not in the first instance have waived a right, a thousand attempted ratifications by him of an unauthorized waiver by his agent cannot give validity to the waiver, or impart legality to a nullity.

So, too, acquiescence can only operate in the sense of a prior consent or authority. It is not in legal intendment more potent than was the silence considered in *Thompson* vs. *Utah, supra.* If, therefore, Frank had a constitutional right to be present at the time of the rendition of the verdict in his case, which he could not waive, that right is not affected either by the authorized or unauthorized consent of his attorneys to the reception of the verdict in his absence, or by his ratification of their attempted waiver, or by his apparent acquiescence therein. His constitutional right, protective of his life and liberty, survives any express or implied consent or waiver by him, in whatsoever form, or by whatever method such waiver is sought to be spelled out.

It should not be overlooked that although the Supreme Court of Georgia in its opinion (*Rec. p. 22*) refers to the absence of Frank, when the verdict was received, as "a mere incident of the trial," according to the authorities which we have cited, this is a grave misconception. His absence did not constitute an irregularity. It created a nullity. It affected the jurisdiction of the Court. It amounted to a fundamental vice in the proceedings. It was no more "a mere incident" of the trial than the right to be heard is a mere incident in any cause, civil or criminal. Upon his presence depended the right of the court to render a judgment which involved the taking of his life, or lib-

erty. When the verdict was received in his absence the jurisdiction of the Court over him, previously existing and to pronounce judgment against him was lost. Thenceforth the case was *coram non judice.* Consequently, although an irregularity might have been waived by Frank, or the waiver of an irregularity by his authorized attorneys might have been ratified or acquiesced in, by him, he could not ratify or acquiesce in an act absolutely null and void to which he himself could not have given vitality.

V.

If, therefore, Frank's absence at the reception of the verdict constituted an infraction of due process of law, whch could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack the judgment as a nullity.

The converse of the proposition is that Frank is estopped from questioning the legality of the judgment. In other words, it must be claimed that though jurisdiction may not be conferred by consent, it may be, by means of an estoppel. This we deny.

Moreover, there is no basis for predicating the claim of estoppel on the fact that the jurisdictional question was not raised on the motion for a new trial. The State has not been injured thereby. It has not changed its position because of the procedure adopted. The verdict had been received, the jury discharged and Frank sentenced, before he knew of the facts which nullified the verdict. The State could not thereafter, by anything that it could do, alter the situation or impart validity to a proceeding which had become a nullity. The verdict was void and avoided the trial, not because of anything that Frank did, but because of the act of the State in disregarding his constitutional right.

When, therefore, in its opinion, the Supreme Court of Georgia, sought to sustain the validity of a nullity, by regarding it as a mere irregularity or error, and treats the procedure adopted on Frank's behalf as an acquiescence in such irregularity, and as operating by way of an estoppel against him, it is merely an attempt on its part to interpret the Fourteenth Amendment, by virtually deciding that Frank's absence at the time of the rendition of the verdict, was not an invasion of the due process clause, that in any event his absence could be waived, and that it was in fact waived by the failure of his attorneys to urge the nullity of the judgment when they moved for a new trial. That would prove to be a new method of overcoming an inherent jurisdictional defect in a judgment and of depriving one whose life is sought to be taken from him without due process of law of having his constitutional right vindicated by this court.

VI.

Even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned, can be raised, then, we contend, that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an ex post facto law.

In view of the history of Georgia procedure, the decision rendered by the State Supreme Court on the application to set aside the verdict was the equivalent of a new law, for the first time adopted, regulating the remedy in a case of constitutional infraction resulting in the nullity of a verdict. Were the decision regarded as holding that a motion for a new trial is the only remedy by which to seek relief in such a case, it would be the first announcement of such a rule by that Court. The most that can be said is that heretofore similar questions have been raised on motions for a new trial, without objection. But hitherto every adjudged case has been to the effect that a motion to set aside the verdict is a proper remedy, and in *Nolan* vs. *State, supra,* and *Lyons* vs. *State, supra,* it was decided that it was *the* proper remedy. Frank relied upon this unbroken line of precedents, the soundness of which had

never been questioned, and had always been recognized. *Rawlins* vs. *Mitchell, 127 Ga. 24.*

This subject will receive further consideration under Point VIII.

If, therefore, the Supreme Court of Georgia, by a sudden departure from its previous decisions, relied upon by him, could deprive him of his right to raise the constitutional question which we have so exhaustively discussed, that decision would in itself not only amount to an infraction of the due process clause of the Constitution, but it would also violate Article I, Section 10 of the Constitution, which prohibits the passing of an *ex post facto* law.

In *Hopt* vs. *Utah, supra,* Mr. Justice Harlan expressly decided that a statute that takes from the accused a substantial right given to him by a law in force at the time to which his guilt relates, would be *ex post facto* in its effect and operation, and that legislation of that kind cannot be sustained, simply because in a general sense it may be said to regulate procedure. "The difficulty is not so much," says Mr. Justice Harlan, "as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes in their operation take from the accused any right that was regarded at the time of the adoption of the statute as vital for the protection of life and liberty and which he enjoyed at the time of the commission of the offense charged against him".

If a court could turn its face upon its previous precedents in a matter so vital as that which we are now considering, then one accused of crime who, as Frank did in the present case, relies upon

such precedents, would be caught like a rat in a trap.

Under the law of Georgia, a unanimous decision of its Supreme Court has the force of a statute until it has been reversed by a full bench after argument on a request for review granted by the Court.

By the *Laws of Georgia, Acts of 1858, p. 74* (embodied in *Georgia Code* of *1882 as § 217*), referring to the Supreme Court, it is provided:

"A decision concurred in by three judges cannot be reversed or materially changed except by a full bench, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument the court, in its decision, shall state distinctly whether it affirms, reverses or changes such decision."

Under this act, it was held that the decision of the full bench was converted into a statute, and that a unanimous decision of the Supreme Court is as binding as an act of the Legislature. (*28 Ga. 597; 30 Ga. 202; 59 Ga. 54.*)

The *Code of Georgia of 1910, § 6207,* provides:

"A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argu-

ment, the court, in its decision shall state distinctly whether it affirms, reverses, or changes such decision.''

The precedents from the Supreme Court of Georgia to which we have referred were unanimous decisions of that court.

In this respect the case comes within the principle laid down in *Muhlker* vs. *N. Y. & H. R. Co., 197 U. S. 544,* where this Court assumed jurisdiction to reverse a judgment of the Supreme Court of New York, *in error to that court,* because the latter had departed from a line of decisions which were regarded as constituting a rule of property. Although that case involved the ''impairment of contract clause'', it is believed that the application of the same principle to a case arising under ''the due process clause'' is founded on equally sound principles of constitutional law.

But irrespective of the considerations which we have thus far discussed under this point, we again urge that in effect the decision actually rendered proceeded on the theory that the course of procedure adopted by Frank, because of his non-action, his failure to raise the constitutional and jurisdictional question at the first opportunity, operated as a waiver of his constitutional right. This view we have sought to show is opposed to the decisions of this Court.

VII.

It follows from the propositions thus far discussed that appellant's application for a writ of habeas corpus is squarely based on the contention that, when the verdict against him was received and judgment was rendered against him the Court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making habeas corpus the proper remedy to test the validity of his detention thereunder.

We concede that a writ of habeas corpus can not be made to perform the office of a writ of error. Irregularities and erroneous rulings on the trial, however egregious, are not reviewable by *habeas corpus*. But it is equally clear, that where the judgment under which a prisoner is detained, lacks jurisdiction in the court which pronounced it, whether wanting *ab initio* or lost in the course of the proceedings against him, it is a nullity, the pronouncement is unlawful, and the writ of *habeas corpus* is the indicated remedy for relief from the unlawful imprisonment.

Section 751 of the United States Revised Statutes provides:

"The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus."

Section 752 declares:

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty."

Section 753 continues:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the Constitution or of a law or treaty of the United States."

Sections 754-756 of the United States Revised Statutes regulate the procedure on such an application.

As we have already shown, in the present case our contention is, that the appellant is in custody in violation of the Constitution of the United States, in that the rendition of a judgment condemning him to death, based on a verdict received in his absence, is not due process of law.

As indicating the distinction between cases which deal with mere irregularities and those which involve an absolute nullity, the opinion in *Matter of Hans Nielsen, 131 U. S. 176,* is most valuable. That case came here on an appeal from a final order of the District Court of Utah Territory, which denied an application for a writ of *habeas corpus.* The petitioner had been twice indicted, once for unlawful cohabitation, and once for adultery. He pleaded guilty to the first of the indictments, and was fined. He was then arraigned on the indictment for adultery and pleaded that he had already been convicted of the offense charged, by his plea of guilty to the first indict-

ment. He was nevertheless convicted and sentenced to imprisonment. He then sued out a writ of *habeas corpus*, on the ground that the court was without authority to impose sentence upon him, because by doing so he had been denied a constitutional right. This Court sustained his contention, reversing the judgment of the District Court. In the course of his opinion Mr. Justice Bradley said:

"The first question to be considered is, whether, if the petitioner's position was true, that he had been convicted twice for the same offense, and that the court erred in its decision, he could have relief by *habeas corpus*. The objection to the remedy of *habeas corpus*, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on *habeas corpus*. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstituional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the case of *Ex parte Lange, 18 Wall. 163*, and *Ex parte Siebold, 100 U. S. 371*, and in several other cases referred to therein. In the case of *In re Snow, 120 U. S. 274*, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one, and was but a single crime until prosecuted; that a second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of

the District Court of Utah, and that a *habeas corpus* would lie for the discharge of the defendant imprisoned on such conviction. In that case, the *habeas corpus* was applied for at a term subsequent to that at which the judgment was rendered; but we did not regard this circumstance as sufficient to prevent the prisoner from having his remedy by that writ.

"It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the *face* of the judgment; but if it appears in the indictment, or anywhere else in the record, of which the judgment is only a part, it is sufficient. In the present case it appeared in the record in the plea of *autre fois* convict, which was admitted to be true by the demurrer of the Government. We think that this was sufficient. It was laid down by this court in *In re Coy, 127 U. S. 731, 758,* that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: 'And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him'; referring to *Ex parte Siebold, 100 U. S. 371.*

"In the present case, it is true, the ground for the *habeas corpus* was, not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a

valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange*, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow; the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte Siebold, 100 U. S. 371, 375*, and is illustrated by the case of *Ex parte Parks*, as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in *Ex parte Parks, 93 U. S. 18, 22*, 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale's Pleas of the Crown, 144. And why should not such a rule prevail *in favorem libertatis?* If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly

be stated with more categorical accuracy than it is in the opening sentence of *Ex parte Wilson, 114 U. S. 417, 420*, where Mr. Justice Gray, speaking for the court, said: 'It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jursdiction of that court, or there is no authority to hold him under the sentence.' This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the Circuit and District courts; but, with regard to the power of discharging on *habeas corpus*, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction.''

Without quoting from it, attention is directed to the decision in *Ex parte Bain, 121 U. S. 1*, especially to the reasoning on pages 13 and 14 of the opinion; also to the various cases which are cited in the opinion of Mr. Justice Bradley (*supra*).

In re Bonner, 151 U. S. 242, 256, Mr. Justice Field, in support of the granting of a writ of *habeas corpus*, said:

"We are * * * of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its au-

thority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offenses within which the one presented is embraced. Then comes the mode of the presentation of the offense to the court. That is specifically prescribed. If the offense be a felony, the accusation in the Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all. If the offense be only a misdemeanor, not punishable by imprisonment in the penitentiary, *Mackin v. United States, 117 U. S. 348,* the accusation may be made by indictment of the grand jury or by information of the public prosecutor. An information is a formal charge against the accused of the offense, with such particulars as to time, place, and attendant circumstances as will

apprize him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end, in either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way. When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict—and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized; it cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one, and the punishment be death, it must be inflicted in the form prescribed by law. Although life is to be extinguished, it cannot be by any other mode. The proposition put forward by counsel that if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion, is certainly not to be tolerated. Imprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character or other attending circumstances. Death might be inflicted by torture, or by starvation, or by drawing and quartering. All these modes, or any of them, would be permissible, if the doctrine asserted by him can be maintained.

Although at first blush they may appear to be cases against us, in reality, the decisions in *Felts* v. *Murphy, 201 U. S. 123* and *Valentina* v. *Mercer, 201 U. S. 131,* are strongly in our favor.

The first of them was an appeal from the Circuit Court of the United States for the Northern District of Illinois, where the petitioner, who had been convicted of murder in the State court, sought to be discharged on *habeas corpus* on the ground that he was so deaf that he could not hear the proceedings on his trial, and that therefore he was deprived of his liberty without due process of law. The court recognized the doctrine in the *Nielsen case,* and distinguished it, by pointing out that in the case under consideration the trial court had at most been guilty of a mere irregularity, hence there was no question of the absense or loss of jurisdiction. Mr. Justice Peckham said, after stating the grounds urged on behalf of the petitioner:

"But upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial *and if it continued all through,* then the application for the writ was properly denied by the Circuit Court, and its order must be affirmed. The writ cannot perform the function of a writ of error."

It is important to note this qualification: "If it (jurisdiction) continued all through." It is our contention that in our case jurisdiction ceased when the appellant was kept out of court at the time of the reception of the verdict and when the domination of the trial by the mob became effective. Although jurisdiction over him and of the cause existed up to that time, it did not con-

tinue all through the trial, but was lost, and he was deprived of his day in court.

In *Valentina* v. *Mercer* (*supra*), which came to this Court on appeal from a denial by the Circuit Court of the United States for the District of New Jersey, of a suit of *habeas corpus* after the prisoner had been convicted of murder in the State court of New Jersey, it was claimed that the prisoner was deprived of a constitutional right, of a very shadowy character, founded on the phraseology of the charge addressed by the trial court to the jury. Here, too, Judge Peckham said:

"Our power to interfere in cases of this nature is limited entirely to the question of jurisdiction. If the State court had jurisdiction to try the case, and had jurisdiction over the person of the accused, *and never lost such jurisdiction*, the Federal Circuit Court was right in denying the application of the petitioner for a writ, and its order must be affirmed."

In *Rogers* v. *Peck*, *199 U. S. 425*, which was also brought here on an appeal from a denial of a writ of *habeas corpus* by the District Court of the United States for the District of Vermont, by which relief was sought from a judgment of conviction rendered in the State Court of Vermont, Mr. Justice Day said:

"The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. *It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that*

such interference is warranted.'' (Citing various cases.)

Nowhere has the principle for which we contend been more clearly stated than it was by Mr. Justice Bradley in *Ex parte Bridges, 2 Woods 428, s. c. 4 Fed. Cas. 105, 106.* There Bridges, who was confined in the Georgia State Penitentiary on a conviction in the Superior Court of Randolph County, Georgia, upon an indictment for perjury committed in the course of a judicial investigation conducted under authority of Congress, petitioned for a writ of *habeas corpus* on the ground that the offense was against the public justice of the United States and was exclusively cognizable in the Federal Courts. His contention was sustained, and in the course of his opinion that great jurist said:

''The court had no jurisdiction of the case. The proceedings were null and void. It is contended, however, that where a defendant has been regularly indicted, tried and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the supreme court of the United States, and that it is too late for a *habeas corpus* to issue from a federal court in such a case. This might be so if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange, 18 Wall (85 U. S.) 163.* As a general rule, when it appears by a return to a habeas corpus that the prisoner is confined upon a regular charge and commitment for a criminal offense, and especially if he be confined in execution after a conviction, he will be at once returned into custody, it being presumed that the court having

such custody has examined, or will examine and lawfully determine the case; and, at all events, that its judgment will be subject to such regular proceedings for review as is provided by law.

"In addition to this cautionary and conservative rule of the common law, the fourteenth section of the judiciary act of 1789 provided that the writ should in no case extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or were necessary to be brought into court to testify. *1 Stat. 82.* This provision prevented its application to persons imprisoned under state process. (But the general rule does not apply where the order of commitment is made by tribunal or officer having no jurisdiction to make it; and the proviso of the 14th section of the judiciary act has been greatly modified.) The benefit of the writ may now be had by prisoners in jail, not only when in custody under authority of the United States, but in 1833, when the nullification proceedings were adopted in South Carolina, it was extended to those in custody for an act done in pursuance of a law of the United States, or of a judgment of any of its courts. *4 Stat. 634.* The primary object of this statute was to protect the revenue officers in carrying out the acts of congress. In 1842, when the complications growing out of the McLeod Case, and the Canada rebellion occurred, it was extended to foreigners acting under the authority and sanction of their own government. *5 Stat. 539.* This was to prevent a single state, as was done by New York in that case, from interfering with our foreign relations.

"In view of our late civil strife, and the necessity of protecting those who claim the benefit of the national laws, congress, by the act of February 5, 1867, extended the writ to 'all cases where any person may be restrained of his or her liberty

in violation of the constitution, or of any treaty or law of the United States,' and made it issuable by 'the several courts of the United States, and the several justices and judges of said courts within their respective jurisdiction.' *14 Stat. 385.* The present case clearly belongs to the last category. The relator was certainly 'restrained of his liberty in violation of a law of the United States.' And although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus,* there seems to be no escape from the law. If it were a case in which the state court had *jurisdiction* of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States. The judgment might be wrong, but the imprisonment under it would be right until the judgment was reversed. But, as before shown, *the state court had not jurisdiction of the offense.''*

In *McClaughry* v. *Deming, 186 U. S. 49,* Mr. Justice Peckham cited with approval from the opinion in *Oakley* v. *Aspinwall, 3 N. Y. 547,* the following, in support of a decision sustaining a proceeding in habeas corpus on the ground of the illegality of a trial by court martial:

''It was, however, urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet, that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion. But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibition of a law—which was not designed

merely for the protection of a party to a suit, but for the general interests of justice."

In *Kaizo* v. *Henry, 211 U. S. 146*, referring to the contention that eight members of the grand jury which indicted the prisoner were disqualified, the effort being to raise that objection by writ of habeas corpus, Mr. Justice Moody said:

"But we find no occasion to decide or consider this question. If the plaintiff in error desired the judgment of this court upon it he should have brought a writ of error to the judgment of the Supreme Court of the Territory which passed upon it in affirming the judgment of conviction in the trial court. He may not lie by, as he did in this case, until the time for the execution of the judgment comes near, and then seek to raise collaterally, by habeas corpus, *questions not affecting the jurisdiction of the court which convicted him*, which were open to him in the original case, and, if properly presented then, could ultimately have come to this court on writ of error. *Unquestionably if the trial court had exceeded its jurisdiction a prisoner held under its judgment might be discharged from custody upon a writ of habeas corpus by another court having the authority to entertain the writ, Ex parte Lange, 18 Wall. 163; Ex parte Siebold, 100 U. S. 371; Ex parte Yarbrough, 110 U. S. 651; Ex parte Wilson, 114 U. S. 417;* * * * But no court may properly release a prisoner under conviction and sentence of another court, *unless for want of jurisdiction of the cause or person*, or for some other matter rendering its proceedings void. * * * Disqualification of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case."

In *Harlan* v. *McGourin, 218 U. S. 442,* Mr. Justice Day said:

"The learned counsel for the appellants rely upon a number of cases which are said to warrant the court in habeas corpus proceedings in examining the bill of exceptions with a view to determining such matters as are herein presented. But an examination of these cases will show that where collateral attacks have been sustained through the medium of a writ of habeas corpus, *the grounds were such as attacked the validity of the judgments, and the objections sustained were such as rendered the judgment not merely erroneous, but void.* * * * No objection is made to the constitutionality of the statute or the right and authority of the court to consider and determine the guilt or innocence of the accused, and for that purpose to weigh and determine the effect of the testimony offered. The contention is that in the respects pointed out the testimony wholly fails to support the charge. *The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.*"

In the recent case of *Stevens* v. *McClaughry, 207 Fed. Rep. 18,* decided by the Circuit Court of Appeals of the Eighth Circuit, it was held that the proper Federal Court may release by writ of habeas corpus one who is being restrained of his liberty by virtue of a judgment of a Federal Court beyond its jurisdiction, and therefore void, and that one who has been restrained of his liberty for many years by virtue of the judgment of

a court which is beyond its jurisdiction and void, is not barred from a release therefrom by writ of habeas corpus *by the fact that he might have secured sucs relief by a writ of error but failed to apply for it until it was too late.*

The opinion of Judge Sanborn is luminous, and, as we believe, applies to the facts of this case in all of its phases. It is especially valuable for its discussion of the opinion in *Matter of Spencer, 228 U. S. 652,* which is clearly shown not to be applicable to a case like the present. His summary is admirably expressed (*pp. 28 and 29*):

"And here is the true distinction between the cases in which the writ of *habeas corpus* may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue. The parallel between the cases of Snow and Nielsen and the case at bar is complete, and unless the decision in the case of Spencer and others [*228 U. S. 652*] has overruled the cases which have just been reviewed, and departed from the fundamental principles they sustain and the practice under them which has prevailed for years in *In re Mayfield, 141 U. S. 107, 116, 11 Sup. Ct. 939, 35 L. Ed. 635; In re Ladd, C. C. 74 Fed. 31, 42; In re Waite, D. C., 81 Fed. 359, 362, 372; Mackey* v. *Miller, 126 Fed. 161, 163, 62 C. C. A. 139; Ex parte Peeke, D. C., 144 Fed. 1016*—there would seem to be no doubt of the power or duty of the court to issue the writ in the case in hand. We are not persuaded that it has overruled them, departed from the rules they maintain, or decided that every one restrained of his liberty by a void judgment which he might have challenged by writ of error, is barred of relief by means of the writ of

habeas corpus. It has not expressly declared that those decisions are wrong, or that the principles on which they rest are erroneous, and they are too firmly established to be overthrown by silence. On the other hand, it has carefully distinguished the leading case, the Lange Case, from those in which its opinion was delivered, and to hold that one who is being deprived of his liberty for a long term of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of *habeas corpus* because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late is to rob the writ of the very purpose of its existence, the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in *Ex parte Lange, 18 Wall., at page 176, 21 L. Ed. 872,* that one who should be sentenced by a justice of the peace having jurisdiction to fine for a misdemeanor, or by a court of general jurisdiction, on an indictment for a libel, to imprisonment and death, who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of *habeas corpus.*"

After all, assuming that a constitutional right guaranteed by the Fourteenth Amendment has been infringed, by the action of a state court, in such a manner as to deprive it of jurisdiction to render a judgment which deprives a citizen of his life or his liberty, and relief has been sought in vain in the state court, and the right of review here by writ of error has been prevented, it has not presented a case, to which the pointed language of Mr. Justice Holmes in *Rogers* v. *Alabama, 192 U. S. 226, 230,* is applicable:

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *Jefferson Branch Bank* v. *Skelly, 1 Black, 436, 443.* But that is merely an illustration of a more general rule. On the same ground there can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the findings, this court would enforce the constitutional requirement. See *German Savings & Loan Society* v. *Dormitzer, 192 U. S. 125.*"

VIII.

The appellant had, before applying for a writ of habeas corpus, exhausted all of his remedies in the State courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this Court has pointed out as controlling in like cases.

We are aware of the decisions of this Court which seek to regulate the issuance of writs of

habeas corpus, in original proceedings here, as well as in the United States District Courts, where the validity of criminal proceedings in a State court is sought to be questioned. The effect of these decisions is that, ordinarily, one applying for the writ of *habeas corpus* to a Federal court, in such a case, must first exhaust his remedies in the State court, and, if a Federal question is involved, by seeking to review the judgment of the State court, in this tribunal by writ of error.

When, however, all of the remedies in the State court, and by writ of error in this Court, have been exhausted, and a right guaranteed by the Federal Constitution has been violated by a State court, to such an extent as to nullify the proceedings of that court and to deprive it of jurisdiction, the sacred writ of *habeas corpus*, preserved even from suspension, except in cases of rebellion or invasion, by Article I, Section 9, paragraph 2, of the Federal Constitution, may still be successfully invoked. This must especially be true, when the right to due process of law derived directly from the Federal Constitution is the basis of the petitioner's contention.

In the enforcement of this right, the exercise of the undoubted jurisdiction of the courts of the United States cannot be made dependent upon the action of the State tribunals, denying the constitutional right asserted or on their refusal to determine it, because of rules of practice adopted or laid down by them. Otherwise they might, in defiance of the Federal judiciary, nullify the Federal Constitution, or neutralize the power of the Federal courts to enforce it, as against its infraction by State agencies, whether executive, legislative or judicial.

While it may well be conceded, from considerations of comity, (*a*) that the Federal courts ought not to issue the writ of *habeas corpus* in advance of trial in the State courts, and (*b*) that after conviction they ought not to issue such a writ, save in exceptional circumstances, until the right of appeal in the State courts has been exhausted, and although it may further be conceded (*c*) that for reasons of convenience, where proceedings in error to review the action of the State courts by this Court are allowed, the writ of *habeas corpus* should not ordinarily issue until the right of review here has been likewise exhausted, yet, where all of these normal modes of procedure have been followed, or where resort to the normal remedies has been denied, or has been lost through misconception, inadvertence, or even ignorance, it would be revolutionary to hold, that a substantive right, grounded on the Federal Constitution, and determinative of the jurisdiction of a State Court, can be disregarded by this Court, simply because the petitioner for a writ of *habeas corpus*, by means of which his constitutional right is sought to be vindicated, might, on some previous occasion, have resorted to another or more usual method for the adjudication of his rights. If no other way is open to him *now*, the door should not be closed upon him because, by the exercise of greater prescience or the possession of an infallible judgment, he might have avoided the necessity of resorting to the Federal courts for relief by means of the writ of *habeas corpus*.

This contention is, we believe, in strict accordance with *Ex parte Royall, 117 U. S. 241*, and the long line of cases which have followed it. It was there expressly held, that the courts of the United

States have jurisdiction on *habeas corpus* to discharge from custody a person who is restrained of his liberty in violation of the Constitution of the United States, but who at the time is held under State process for trial on an indictment charging him with an offense against the laws of the United States. It was, however, declared, out of considerations of comity, that when a person is in custody under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, a court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion is subordinated to special circumstances requiring immediate action. After the conviction of the accused in the State court, the Federal court has still a discretion whether he shall be put to his writ of error to the highest court of the State, or whether it will proceed by writ of *habeas corpus* summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States. Although in that case the writ of *habeas corpus* was withheld because the petitioner had not exhausted his other remedies, in concluding his opinion Mr. Justice Harlan said:

"As it does not appear that the Circuit Court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, *but without prejudice to the right of the petitioner* to renew his applications to that court

at some future time should the circumstances render it proper to do so."

In *Ex parte Charles W. Fonda, 117 U. S. 516,* Mr. Chief Justice Waite, said:

"This motion is denied on the authority of *Ex parte Royall.* No reason is suggested why the Supreme Court of the State may not review the judgment of the circuit court of the county, upon the question which is raised as to the application of the statute, under which the conviction has been had, to embezzlements by the servants and clerks of national banks; nor why it should not be permitted to do so without interference by the courts of the United States. *The question appears to be one which, if properly presented by the record, may be reviewed in this court after a decision by the supreme court adverse to the petitioner. The case as made by the motion papers is not one which, under the principles settled in Royall's Case, requires this Court to act in advance of the orderly course of proceeding for a review of the judgment by writ of error.*"

In *Wood v. Brush, 140 U. S. 278,* Mr. Justice Harlan said, in part:

"Whether the appellant might not have availed himself, in other modes, and during the trial, of the objection now under consideration, we need not inquire; for, independently of the view we have expressed, and even if there were some room for a different construction of the New York Code, *the Circuit Court might well have forborne to act until this question had been definitely determined, either in the highest court of New York, or in this court upon a writ of error sued out by the appellant.* While the courts of the United States have power, upon *habeas corpus,* to inquire into the cause of the detention of anyone claiming to be

restrained of his liberty in violation of the Constitution, or laws, or treaties of the United States, it was not intended by Congress that they should by writs of *habeas corpus* obstruct the ordinary administration of the criminal laws of the States, through their own tribunals. 'Where', this court said in *Ex parte Royall, 117 U. S. 241, 252, 253,* 'a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus,* in advance of his trial in the court in which is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus,* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. *And we will add, that after the final disposition of the case by the highest court of the State, the circuit court, in its discretion, may put the party who has been denied a right, privilege or immunity claimed under the Constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of habeas corpus.* These principles have special application where, as in the present case, there is no pretense that the Statute under which the prosecution of the appellant was conducted is repugnant to the Constitution or laws of the United States.''

In *Cook* v. *Hart, 146 U. S. 183*, Mr. Justice Brown said in concluding:

"While the power to issue writs of *habeas corpus* to state courts which are proceeding in disregard of rights secured by the Constitution and laws of the United States may exist, the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waived no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are equally with Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. *Should such rights be denied, his remedy in the Federal court will remain unimpaired.* So far from there being special circumstances in this case to show that the Federal court ought to interfere, the fact that, with ample opportunity to do so, he did not apply for this writ until after the jury had been sworn and his trial begun in the state court, is of itself a special circumstance to indicate that the Federal court should not interpose at this time."

In *Ex parte Frederich, 149 U. S. 70*, Mr. Justice Jackson said in concluding:

"It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes than to award him a writ of *habeas corpus*. For, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the Federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him

thereafter, within the limits of proper authority, instead of discharging him by *habeas corpus* proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged.

In some instances, as in *Re Medley, 134 U. S. 160*, the proceeding by *habeas corpus* has been entertained, although a writ of error could be prosecuted; but the general rule and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a State court violates his rights under the Constitution or laws of the United States to *seek* a review thereof by writ of error instead of resorting to the writ of *habeas corpus*.

"In the present case we agree with the court below that the petitioner had open to him *the remedy by writ of error from this court* for the correction of whatever injury may have been done to him by the action of the state courts, and that he should have been put to that remedy rather than given the remedy by writ of *habeas corpus*. The circuit court had authority to exercise its discretion in the premises, and we do not see that there was any improper exercise of that discretion, under the facts and circumstances.

"Without passing, therefore, upon the merits of the question as to the constitutionality of the provision of the code under which the supreme court proceeded in disposing of the case, when it was before it, or upon the question of the validity of the judgments rendered by the state courts in the case, we are of opinion, for the reasons stated, that the order of the circuit court refusing the application for the writ of *habeas corpus* was correct, and it is accordingly affirmed."

In *New York* v. *Eno, 155 U. S. 89, 95,* Mr. Justice Harlan said in part as follows:

"This court denied the application upon the authority of *Ex parte Royall,* observing that no reason had been suggested why the supreme court of the state might not review the judgment of the inferior state court upon the question as to the application of the statute under which the conviction was had to embezzlement by the servants and clerks of national banks, nor why it should not be permitted to do so without interference by the courts of the United States; that the question appeared to be one which, *if properly presented by the record, might* be reviewed in this court after a decision by the supreme court of state adverse to the petitioner."

In *Pepke* v. *Cronan, 155 U. S. 100,* Mr. Chief Justice Fuller said:

"It is insisted upon the argument that the judgment in contempt was not appealable (*State* v. *Davis, 2 N. D. 461*) but it was conceded that the validity of the law and the sentence could be contested by the supreme court of the state on *certiorari* or *habeas corpus* and no reason was suggested why, if the judgment of the district court was the final judgment of the highest court of the state in which a decision in the matter could be had, a writ of error from this court might not be applied for.

"Without considering the merits of the questions discussed, the judgment must be affirmed upon the authority above stated."

In *Re Chapman, 156 U. S. 211,* Mr. Chief Justice Fuller said in concluding:

"In the case before us, the question as to the jurisdiction of the Supreme Court of the District

of Columbia has indeed already been passed upon by that court and also by the court of appeals, upon a demurrer to the indictment, but the case has not gone to final judgment in either court, and what the result of a trial may be cannot be assumed. We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired *until* the conclusion of the procedings. If judgment goes against petitioner and is affirmed by the court of appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. *If, on the other hand, a writ of error does not lie to this court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of habeas corpus.* We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the district upon the merits of the case before them.''

In *Whitten* v. *Tomlinson, 160 U. S. 231,* Mr. Justice Gray said:

''But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus in advance* of a final determination of his case of the courts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court.''

In *Baker* v. *Grice, 169 U. S. 284,* Mr. Justice Peckham said:

''If this application had been made *subsequently* to a trial of the petitioner in the state court and his conviction upon such trial under a holding by that court that the law was constitutional, and

where an appeal from such judgment of conviction merely imposing a fine could not be had, excepting upon the condition of the defendant's imprisonment until the hearing and decision of the appeal, *a different question would be presented* and one which is not decided in this case, and upon which we do not now express any opinion."

In *Tinsley* v. *Anderson, 171 U. S. 101,* Mr. Chief Justice Fuller said:

"The dismissal by the Circuit Court of the United States of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this court, that the circuit courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint or liberty of any person in custody under the authority of a state in violation of the Constitution, a law or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person *in advance* of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court."

In *Fitts v. McGhee, 172 U. S. 516,* Mr. Justice Harland said:

"Further, even if the Circuit Court regarded the act of 1895 as repugnant to the Constitution of the United States, the custody of the accused by the state authorities should not have been disturbed by any order of that court, and the accused should have been left to be dealt with by the state court, with the right, after the determination of the case in that court, to prosecute a writ of error from this court for the re-examination of the final judgment so far as it involved

any privileges secured to the accused by the Constitution of the United States."

In *Markuson* v. *Boucher, 175 U. S. 184,* Mr. Justice McKenna, concluding, said:

"The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons. *Nor does the question arise what right appellant would have had to petition relief from the District Court if his remedies against the judgment of the state court had ceased to exist.*"

In *Minnesota* v. *Brundage, 180 U. S. 499,* Mr. Justice Harlan, concluding, said:

"Without expressing any opinion as to the validity of the Minnesota statute, the judgment of the Circuit Court must be reversed, with directions to dismiss the application for a writ of *habeas corpus, without prejudice to a renewal* of it when the appellee shall have exhausted the remedies provided by the State for a review of the judgment of the Municipal Court of Minneapolis."

In *Urquhart* v. *Brown, 205 U. S. 179,* the right of the Federal court to determine the jurisdiction of a State court in a criminal case by writ of *habeas corpus* was recognized, Mr. Justice Harlan saying:

"It is the settled doctrine of this court that although the Circuit Courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon *habeas corpus,* one held in custody by State authority in violation of the Constitution or of any treaty or law of the United States, the court, justice or judge has a discretion *as to the time and*

mode in which the power so conferred shall be exerted; and that in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several States, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under State authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. *After the highest court of the State, competent under the State law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination.* The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by *habeas corpus in advance of final action by the authorities of the State* are those of great urgency that require to be promptly disposed of,'' etc.

In *Glasgow* v. *Moyer, 225 U. S. 420,* Mr. Justice McKenna said, in part:

''Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, *he not having availed himself of the remedy,* to permit him to prosecute *habeas corpus.* The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue; in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found; and, if the decision was against him, test its correctness through the proper appellate tribunals.''

There is nothing in *Ex parte Spencer, 228 U. S. 652,* which militates against the appellant's right to maintain these proceedings, or which disturbs the doctrine recognized in the cases above cited, that after the exhaustion of remedies in the State

court and by an effort to review their determination in this Court, the Federal courts will by writ of *habeas corpus* in a proper case, determine a jurisdictional question based upon one of the rights guaranteed by the Federal Constitution. That was an original motion in this Court, for leave to file an application for a writ of *habeas corpus* to investigate the legality of a sentence imposed by the Pennsylvania Court of Quarter Sessions under the Indeterminate Sentence Act. After sentence the petitioner had taken an appeal to the Superior Court of Pennsylvania, where the sentence was affirmed. Subsequently he presented a petition to the Supreme Court of the State praying for an allowance of the right to appeal, but that petition was refused. In neither court was the question of the constitutionality of the Pennsylvania act under which the sentence was imposed, raised, nor was any constitutional question presented. The petitioner subsequently sought, by *habeas corpus* in the State court and in the United States District Court, to litigate the legality of his sentence, but both petitions were refused. It was pointed out that the petitioner had ample opportunity to avail himself of the objections to the validity of his sentence, but failed to do so, and that the circumstances of the case were not of so exceptional a nature as to call for interference by *habeas corpus*.

This Court also held, that where, as in Pennsylvania, the judgment of a trial court in criminal cases is subject to modification, as well as affirmance or reversal, by the appellate court, and a sentence partly legal and illegal under the State law can be modified by striking therefrom the illegal part, such sentence is erroneous and not

void, and that consequently this Court will not on *habeas corpus* pass upon the question of the legality of the part of the sentence complained of, the proper remedy being to review the judgment on appeal.

It was also decided that it was not the duty of this Court to question the decision of the State court as to the effect of one State statute upon an earlier one, or to declare which of two rules, supported by conflicting decisions, the State will apply.

That there was no conflict between this decision and the previous adjudications, is clearly pointed out in *Stevens* v. *McClaughry, 207 Fed. Rep. 18.*

It is to be observed in the present case, that the point on which we rely, the loss of jurisdiction, occurred at the later stages of the trial which culminated in the verdict whose nullity we assert, at a time when the appellant and his counsel were absent from the court, as the result of coercion. He never knew of the circumstances under which the verdict was rendered in his absence, until after he had been sentenced to death and judgment had been pronounced against him. At that time jurisdiction no longer existed. There was nothing that he could have done then, for the protection of his rights of which he had already been deprived. Had he then undertaken to call the attention of the court to the fact that his constitutional rights had been impaired, the situation could not have been altered. The verdict had been received and the jury discharged. He had been condemned without due process of law, and nothing that the court could do, would restore the jurisdiction which it had lost, or impart life to that which was dead. It is likewise true that

there was nothing that he or his counsel could have done to overcome the action of the mob which was subverting the orderly processes of the law. The Court itself confessed its powerlessness, and submitted to mob domination. That invalidated the trial and nothing could thereafter make it valid.

Even assuming that appellant's motion for a new trial might have been predicated upon this deprivation of his rights and the loss of jurisdiction which ensued (although the Supreme Court of Georgia in *Nolan v. State, 53 Ga. 137; 55 Ga. 522*, and in other decisions, had adjudged it not to be the proper remedy,) yet the fact that the point was not raised by that motion or by writ of error to review the denial of the motion for a new trial did not, and could not, confer validity on that which was a nullity.

The appellant, however, attempted to raise the jurisdictional question by a motion to set aside the verdict, and to review it in this Court by writ of error. That opportunity was not vouchsafed to him, because the decision of the Supreme Court of Georgia, was based in part on a non-Federal question. Yet appellant's inability to procure a review here of the decision of the State court did not convert into due process of law that which offended against the constitutional requirements, and therefore should not preclude him from raising the question which he now seeks to present by habeas corpus, namely, whether or not the judgment pronounced against him was void because at the time of its pronouncement the court had lost jurisdiction.

In *Stevens* v. *McClaughry, 207 Fed. Rep. 18,* where the prisoner failed to seek relief by writ of error until it was too late, it was nevertheless held that it was within the power of the court to grant him relief from detention under a void judgment.

So, in the present case, if the prisoner had failed altogether to make a motion for a new trial or to apply for a writ of error until it was too late, the same result would follow. An utter failure to apply for a writ of error until it is too late, does not differ from a failure to raise the question of jurisdiction in the State court in a proceeding in which that objection might have been raised, but was not in fact raised.

Indeed the exhaustion of remedies in the State courts cannot be said to be a jurisdictional condition precedent to the institution of habeas corpus proceedings in the Federal Court. This Court has merely indicated that, in certain cases such procedure is proper and desirable. But the right has always been reserved by it, in cases of importance, to act regardless of the proceedings taken to review the determination of the State courts.

In the present case there was a most strenuous and earnest effort to obtain such review. Counsel acted on the assumption that the rule laid down in *Nolan* v. *State, supra,* was the law of Georgia. It was not until the decision in appellant's case by the Supreme Court of that State, that it had ever been held in that court that the proper remedy in such a case as the present, was not that pointed out in *Nolan* v. *State*—a motion to set aside the verdict—but a motion for a new trial.

The circumstances in the present case are such, that we feel justified in enlarging on the phase of the subject which we are now discussing, not for the purpose of seeking to review the decision of the Supreme Court of Georgia in *Frank* v. *State, 83 S. E. Rep. 645,* as to what the proper procedure in that State is, but to show that the appellant and his counsel had at least ample justification, in the decisions of Georgia, for their omission to raise the fundamental questions which are presented by this proceeding, on the motion for a new trial, and for their conclusion that the proper mode of presenting them was by the motion subsequently made to set aside the verdict.

In *Nolan* v. *State, 53 Ga. 136,* the prisoner, after his first conviction, moved in arrest of judgment, stating as a ground for reversal, that the verdict of the jury had been received in his absence. The Supreme Court decided that such a motion was not the proper remedy, but that a motion to set aside the verdict was. The judgment of conviction was affirmed. After the affirmance, the prisoner moved to set aside the verdict on the ground of its illegality. That motion was granted. A second trial followed, and the judgment then rendered was brought for review to the Supreme Court of Georgia, in *Nolan* v. *State, 55 Ga. 521.* There the propriety of the procedure adopted was recognized.

These decisions, rendered in 1874 and 1875, respectively, were considered by the legal profession in Georgia as firmly establishing the proposition, that a motion to set aside the verdict was in such a case the correct practice.

In November, 1909, the Court of Appeals of Georgia, which has jurisdiction to declare and promulgate the law (*Georgia Laws 1906, p. 24; Georgia Code of 1910, § 6506*), in an opinion by Chief Justice Hill, couched in terms incapable of being misunderstood, in *Lyons* v. *State, 7 Ga. App. 50*, declared the law as follows:

"This is not a motion to set aside a judgment; because there seems to have been no judgment rendered in the case. It is a petition to vacate and set aside a verdict, for an irregularity not appearing on the face of the record, on which a rule was issued and served; and it certainly constituted a proceeding in a court of law having full jurisdiction of the subject-matter alleged in the petition. We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted. The rendition of the verdict during his enforced absence, without a waiver by himself, deprived him of a constitutional right. The error is hardly one that would be proper matter in a motion for a new trial; and if the defendant were compelled to resort to a motion for a new trial to correct such error, he would be prevented from asserting another great constitutional right,—the right not to be again placed in jeopardy for the same offense. Neither his counsel nor himself was present to object to the reception of the verdict. Certainly it could not be expected that he would be required to file a bill in equity, if such a thing could be done, to get rid of this verdict which had been improperly rendered in his absence. The procedure which he adopted was a direct and simple procedure for the assertion of his rights and for the application of the remedy for which he prayed. It was a remedy approved by Chief Justice Warner, speaking for the court, in the case of *Nolan* v. *State, 53 Ga. 138*, as follows: 'It was the legal right of the defendant to be present when the verdict was rendered; and had a motion to

set aside such verdict been made on the ground of his absence, it should have been granted.' 'If the defendant is not present when the verdict is rendered, that is a fact extrinsic of the record, and may be shown on a motion to set aside the verdict for that reason.' 'A verdict rendered during the compulsory absence of the defendant is illegal, and will be set aside on motion.' *Barton* v. *State, 67 Ga. 653 (44 Am. R. 743)*. The procedure adopted in this case is in accord with the trend of modern judicial utterance and legislative enactment to do away with all technical niceties of pleading and to present to the court, clearly and simply, the issues involved in the case.''

These decisions, and others that followed them, had never been departed from until the announcement of that, printed at pages 22-39 of the present record. The new Georgia procedure was thus for the first time promulgated in the appellant's case, and in a form which conflicted *in toto*, with the prior promulgation by the State Supreme Court of the practice which appellant followed.

The dilemma of appellant's counsel can be best illustrated by what the Supreme Court said on the two occasions when the *Nolan* case came before it, and what it subsequently said in his case:

From the first Nolan case:	*From the Frank case:*
"That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his	"This last statement (that a motion to set aside the verdict was the proper remedy), from an examination of the record, is obiter. But what was probably meant by a motion to set aside was in the sense of being a motion

absence, that motion should have been granted by the court.''

From the second Nolan case:

''The motion to set aside the verdict in the case at bar was made after the denial of a motion in arrest of judgment: see 53 Georgia Reports, 137; and the state contends that such a motion (motion to set aside) is equivalent to an application for a new trial: 30 Georgia Reports, 191. This is an effort to draw the prisoner into a second jeopardy as the price of escaping from the first. It is hard enough to pay the price where a new trial is actually moved for and granted. We think such a traffic in jeopardies is not to be considered as conducted by implication. The bill of rights declares that 'no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial, after conviction, or in a case of mistrial. Code, section 5000.''

for a new trial, as such motions have been likened to motions in arrest and to set aside.''

''See *Prescott* v. *Bennett, 50 Ga. 266, 272,* where Judge Trippe said:

'It is true that a motion entitled a motion to set aside is sometimes made for matters extrinsic the pleadings or record. In such cases they are practically more to be likened unto motions for new trials, and substantially are the same in form and effect.'

This is probably what Judge Warner meant by the obiter expression quoted above from the Nolan case; for, from the cases cited in which opinions were delivered prior to that utterance. it will be seen that a motion for a new trial was an available remedy in such cases, and it will be noted, too, that Judge Warner presided and delivered the opinion of the court in the Prescott Case, in which Judge Trippe used the language quoted above in his concurring opinion.''

It is further to be noted that, while in our case the Supreme Court of Georgia held, that the failure to raise the question, which we are treating as jurisdictional, on a motion for a new trial, operated as an acquiescence in and a waiver of the objection, in *Nolan* v. *State* no motion for a new trial was made, and the motion to set aside the verdict was filed and entertained at a term subsequent to that at which the prisoner had been convicted.

The Code of Georgia in force at the time of the *Nolan* decision (*Georgia Code of 1873, § 3719*) provided:

"3719: *Application to be made during term.* All applications for a new trial, except in extraordinary cases, *must be made during the term at which the trial was had,* but may be heard, determined and returned in vacation."

The Code of Georgia in force at the time of appellant's trial (*Georgia Code of 1910, § 6089*) reads:

"6089. *Application for new trial.* All applications for a new trial, except in extraordinary cases, *must be made during the term at which the trial was had;* and when the term continues longer than thirty days the application shall be filed within thirty days from the trial, together with the brief of evidence, subject to the approval of the judge and subject to the right of amendment allowed in applications for a new trial; and all applications herein provided for may be heard, determined and returned in vacation."

It necessarily follows, that if failure to include the objections on which we now rely in a motion

for a new trial actually filed, rendered them unavailable, then certainly the same consequences should have followed in a case where no motion for a new trial was filed at all.

In the recent decision of the Supreme Court of Georgia in appellant's case, reliance was placed on the decision in *Lampkin* v. *State, 87 Ga. 517* (*Rec. p. 37*). The interpretation given to that latter, was we submit one, which could not have been foreseen by appellant or his counsel. That is indicated by comparing the language of the prior decision with the interpretation given to it in the later opinion:

Seventh headnote in Lampkin case:	*From the Frank case:*
"When facts, and a witness by whom they can be proved, to manifest the incompentency of a juror, come to the knowledge of counsel for the accused, after the jury are sworn but before any further step in the trial has been taken, the question of the juror's competency should then be raised and submitted to the court. It is not sound practice for counsel to remain silent, take the chances of acquittal for his client and then, after conviction, urge the juror's incompetency as a ground for setting the verdict aside."	"As said by this court in effect in the case of Lampkin *v.* State, 87 Ga. 517, 13 S. E. 523, it is not sound practice for counsel to make a waiver of their client's presence at the reception of the verdict, take the chances of acquittal for their client, and then, after verdict of guilty, the defendant should be allowed to repudiate the action of counsel to set aside the verdict because of the absence of the defendant at the time it was rendered."

The effect of this unexpected announcement of a new rule of procedure was, to deprive this Court of the right to review the decision of the Supreme Court of Georgia by writ of error, a procedural question being presented which was non-Federal, and, therefore, non-reviewable although the State Court also undertook to decide a question arising under the Federal Constitution.

It would prove a serious reflection upon the law, which would give rise to unfortunate misunderstanding and serious animadversion, if, under these circumstances, a man may be deprived of his life by a judgment void for lack of jurisdiction, simply because counsel resorted to what the court *ex post facto* declared to be the wrong remedy, although in reality they sought to pursue the strict letter of previous adjudications.

IX.

Judge Newman entirely misconceived the decisions which led to a denial of a writ of error to review the judgment of the Supreme Court of Georgia, and misapplied them.

The reason for the denial of a writ of error by this Court, and its several members, was not that a Federal question was not involved in the case, but that the Supreme Court of Georgia put its decision upon two grounds, (1) that the Fourteenth Amendment to the Constitution was not

violated, and (2) that in any event it was too late to raise that question on the motion to set aside the verdict, because it should have been raised on the motion for a new trial, which appellant had made.

If the second of these grounds had been omitted, then, unquestionably, a Federal question would have been involved, namely, whether or not the petitioner had been deprived of due process of law. But inasmuch as the court rested its decision on two grounds, one of them constitutional and the other procedural, and each of the grounds was a sufficient basis for the affirmance by the Supreme Court of Georgia of the judgment of the lower court, this Court held, in accordance with numerous precedents, that under these circumstances a writ of error from this Court would not lie.

Waters-Pierce Oil Co. v. *Texas, 212 U. S. 112.*
Allen v. *Arguimbau, 198 U. S. 149.*
Garr, Scott & Co. v. *Shannon, 223 U. S. 458.*

Our hope was, to satisfy the Court that the two grounds stated were not independent of one another, but interdependent, and that the decision of the Supreme Court of Georgia amounted, in substance, to a determination, that the failure to raise the objection based on the absence of the petitioner at the time of the rendition of the verdict, was in effect a determination that, by his non-action or acquiescence, he had waived a constitutional right which, it had been held by this Court, could not be waived expressly. It is evident, however, that the view prevailed here, that

the Supreme Court of Georgia, whether right or wrong, had determined that the proper remedy was a motion for a new trial, and not a motion to set aside the verdict.

Our present proceeding, an application for a writ of *habeas corpus*, is not circumscribed by any procedural objection of the character involved on the application for a writ of error. It is an independent and plenary proceeding in the Federal court, based on the proposition that, because the appellant was prevented from being present in court, at the time of the rendition of the verdict without his fault and because he was deprived of a trial before a competent tribunal, the judgment based on the verdict was a nullity, he having been deprived of due process of law, and in consequence the court had lost jurisdiction. That presents a proposition which is not affected by State practice. The case is in the precise situation that it would occupy if no timely proceeding had been attempted in the State courts of Georgia, either by motion for a new trial or to set aside the verdict. In that event, the bare question presented in this proceeding would have been, Did the court possess jurisdiction to pronounce sentence of death? That is the exact condition that now exists. That is the same question which must now be answered. The fact that unavailing attempts have been made to procure a determination of this question in the State court, does not preclude the appellant from now asserting the nullity of the judgment. If the trial court lost jurisdiction by the facts detailed in the petition, if the judgment of death was thereby rendered a nullity, the appellant's unavailing attempts in the State court for relief from the consequences of such action,

cannot make that a legal judgment which was before a nullity.

It is to meet just such situations, that the sacred writ of *habeas corpus* was devised, and it would be a sad day in our judicial history if a man, struggling for life as against a void judgment, should be informed that, because of an error in procedure, that which is in realty nothing, has become an effective instrument of death.

X.

In the present case, the Superior Court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings, being nullities, he is entitled to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial under the indictment.

There is abundance of authority in support of this proposition.

In *Ex parte Badgley, 7 Cowen 472,* it was adjudged that where there are two causes of imprisonment or detention, one good, and the other invalid, the Court may on *habeas corpus,* dis-

charge as to the invalid cause, and remand the prisoner as to the other.

In *Medley, Petitioner, 134 U. S. 160, 174,* one convicted in the State Court of murder, was sentenced to death, that being the punishment when the crime was committed and to the further punishment of imprisonment by solitary confinement until execution. This Court held that the sentence imposing both punishments was void, the law authorizing it being *ex post facto*. Dealing with the question as to what subsequent proceedings were proper, Mr. Justice Miller said:

"The language of the act of Congress, however, seems to have contemplated some emergency of the kind now before us. Section 761 of the Revised Statutes declares that the court, or justice, or judge (before whom the prisoner may be brought by writ of *habeas corpus*) shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

"What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of Section 753, he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against, in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the statute under which he is now held in custody is an *ex post facto* law in regard to his offense, it repeals

the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the Attorney General of the State of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court."

In *re Bonner, 151 U. S. 256-259, 261, 262,* the petitioner was sentenced on conviction to imprisonment in a penitentiary, which it was decided was an illegal punishment. Discussing the judgment which under the circumstances should be rendered in the *habeas corpus* proceedings instituted in this Court, Mr. Justice Field said:

A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges—perhaps with the majority—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that, therefore, the writ of *habeas corpus* cannot be invoked for the relief of a party until the time has expired to which the judgment should have been limited. But that question is only of speculative interest here, for there is here no question of excess of punish-

ment. The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of *habeas corpus* in such a case is a virtual suspension of it, and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source—equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals. * * *

"The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*. Section 761 of the Revised Statutes on this subject provides that: 'The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' It would seem that in the interest of justice and to prevent its defeat, this court might well delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects for want of jurisdiction which are the subject of complaint in that judgment may be corrected. *Medley, Petitioner, 134 U. S. 160, 174.*

"In the case of *Coleman* v. *Tennessee, 97 U. S. 509,* a party, who had been convicted of a capital offense, and the judgment had been confirmed by the Supreme Court of that State, was discharged by judgment of this court because it was held that the State court had no jurisdiction to try a soldier of the army of the United States for a military offense committed by him whilst in the military service and subject to the articles of war. But as it appeared that the prisoner had been tried by a court-martial regularly convened in the army for the same offense and sentenced to be shot, and had afterwards escaped, this court, in reversing the judgment of the Supreme Court of Tennessee, stated that that court could turn the

prisoner over to the military authorities of the United States. He was so turned over, and the punishment was commuted to life imprisonment, and he was sent to Fort Leavenworth to serve it out.

"In some cases, it is true that no correction can be made of the judgment, as where the court had under the law no jurisdiction of the case—that is, no right to take cognizance of the offense alleged, and the prisoner must then be entirely discharged; but those cases will be rare, and much of the complaint that is made for discharging on *habeas corpus* persons who have been duly convicted will be thus removed."

In *Ex parte Scott, 70 Miss. 247, 11 So. Rep. 657,* the general nature of which bears strong resemblance to the present case, Judge Woods said:

"The petition of the relator avers that he is in the custody of the sheriff of Warren County, who holds him as the agent of the keeper of the State prison, and to whom the said sheriff is about to deliver him, to undergo imprisonment pursuant to the judgment of the circuit court of said county, and that such judgment is a nullity, because relator says it was founded upon a verdict rendered against him by eleven men. The return of the sheriff, among other matters showing his authority for relator's detention, states that the judgment of said circuit court (meaning the record of said court) shows that the relator was tried by eleven jurors; * * * Mere reversible error must not be examined into on *habeas corpus,* and the party must be driven to his direct appeal, the proper mode of rectification of irregularities. But for incurable, radical, fatal defects, plainly and indisputably manifest of record, relief should be granted even on *habeas corpus.* The error complained of is incurable by any supplementary oral proof. It is not an irregularity merely. It is an omission

of a fact from the record which no presumption may be invoked to supply. It is a fatal defect, affecting the jurisdiction of the court. The constitutional right to trial by twelve men must be secured to every defendant, and a verdict by six men, or by eleven men, is absolutely void, and judgment founded on such nullity must necessarily be itself a nullity. The court undoubtedly had jurisdiction of the relator and of the subject-matter, and ordinarily no other question will be considered on *habeas corpus. But, in the present instance, we see indisputably the intervention of an unauthorized agency, whereby the defendant's guilt of the crime laid to his charge was established and the jurisdiction of the court was broken and lost. There was no power to pronounce judgment, because there was no verdict of guilt on which to base it. In our view, the relator stands just as if he had not been tried at all.* The verdict is a nullity, and the judgment upon it is a nullity. The judgment below will be reversed, but the prisoner will not be discharged. He has not yet been tried, and will therefore be remanded to the custody of the sheriff of Warren County, to be held to answer the charge of burglary and larceny originally preferred against him."

In *People ex rel. Devoe* v. *Kelly, 97 N. Y. 212,* it was held, that where a person convicted of the crime of assault in the third degree was sentenced to imprisonment at hard labor in State's prison, while the sentence was void, the conviction was valid; the prisoner was therefore not entitled to a discharge on *habeas corpus,* but should be remanded to the custody of the sheriff, that the trial court might deal with him according to law. Judge Danforth, said:

"But the conviction is still valid and the prisoner not entitled to his discharge. He should be

remanded to the sheriff of Otsego county in order that the Court of Sessions may deal with him according to law. (*People ex rel Bork* v. *Gilbert, 96 N. Y. 631; People v. Bork, id. 188.*) So far, therefore, as the order of the county judge directs the prisoner to be remanded to the custody of the sheriff, it is right, as is also the judgment of the General Term, so far as it affirms such direction, and to that extent they should be affirmed."

In *Michaelson* v. *Beemer, 72 Neb. 761, 101 N. W. Rep. 1007*, it was held, that where a prisoner is held under a void commitment, but is properly informed against by information or indictment charging a crime, before a court of competent jurisdiction, on a *habeas corpus* proceeding he should be discharged from his confinement on the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him. Commissioner Oldham said:

"But when the defendant pleaded not guilty, and the cause was set for trial on such plea, the only tribunal provided by the Constitution and laws of this State that had authority to determine whether the defendant was guilty or innocent of the offense charged in the information was a jury summoned from the county in which the offense was alleged to have been committed. When the judge of the court, acting under a mistaken conception of the effect of the consent of the prisoner, undertook to determine the question of his guilt or innocence of the felony charged, his judgment and sentence based on such judgment was a mere nullity, and absolutely void. From this line of reasoning it follows that the commitment under which the respondent warden detains the petitioner in the penitentiary is a legal nullity. It therefore follows that so much of the judgment of the district court as remanded

the prisoner to the custody of the warden of the penitentiary is erroneous, and should be set aside.

"It does not follow, however, as contended by counsel for the prisoner, that because the commitment under which the warden detains the prisone is insufficient, that the prisoner should be discharged from further proceedings, for it is provided by *Section 2492, Cobbey's Ann St.*, which governs *habeas corpus* proceedings, among other things, that when the said judge shall have examined into the cause of the caption and detention of the prisoner so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such person from said confinement, and, in case the person or persons applying for such writ shall be confined or detained in a legal manner on a charge of having committed any crime or offense, the said judge shall at his discretion, commit, discharge, or let to bail such person or persons. Now, it clearly appears that an information properly charging the offense of grand larceny, to which the prisoner has pleaded not guilty, is pending against him for trial before a duly authorized tribunal in Garfield County, and the rule covering such case is that, if the commitment on which the prisoner is detained is insufficient, the court, on *habeas corpus*, will discharge the prisoner from that commitment, and will recommit him to the custody of the court having jurisdiction of the offense properly charged by indictment or information against him. *Ex parte Bennett, Fed. Cas. No. 1311, 2 Cranch, C. C. 612; In re Ring, 28 Cal. 248; Miller v. Snyder, 6 Ind. 1; In re Mason, 8 Mich. 70; Ex parte Badgely, 7 Cow. 472.*

"It is therefore recommended that the judgment of the district court be reversed, and the cause remanded, with directions to the trial court to discharge the prisoner from his confinement in the penitentiary on the warrant of commitment based on the void judgment and sentence of the

judge of the district court of Garfield County, and that the prisoner be required to enter into a recognizance for his appearance at the next term of the district court of Garfield County to answer the charge of grand larceny therein pending against him, and that these proceedings and the recognizance so directed be certified to the district Court of Garfield County, as provided by *Section 2492, Cobbey's Ann. St.*, and that in default of the recognizance so directed the prisoner be committed to the jail of Garfield County, there to remain until discharged by due process of law."

XI.

It is respectfully submitted that the judgment of the District Court of the United States for the Northern District of Georgia, should be reversed, and a writ of habeas corpus allowed, as prayed.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Appellant's Counsel.

APPENDIX.

(Referred to on pages 71 and 73.)

GEORGIA.

In Georgia, the presence of the accused at all stages has been held to be essential to the validity of the trial. The following stages of the trial have been specifically dealt with:

1. **At his arraignment:**
   Wells v. *Terrell, 121 Ga. 368.*

2. **At the declaration of a mistrial.**
   Bagwell v. *State, 129 Ga. 170.*

3. **At the argument of the Solicitor=general:**
   Tiller v. *State, 96 Ga. 430.*

4. **At the reading over by the court of the written testimony taken down by it to the jury:**
   Wade v. *State, 12 Ga. 25.*

5. **At the charge of the court:**
   Hopson v. *State, 116 Ga. 90.*

6. **At a recharge:**
   Martin v. *State, 51 Ga. 567.*
   Bonner v. *State, 67 Ga. 510.*
   Wilson v. *State, 87 Ga. 583.*

7. **At the rendition of the verdict:**
   Nolan v. *State, 53 Ga. 137.*
   Barton v. *State, 67 Ga. 653.*

Excerpts from the above decisions are given below in the order cited.

In *Wells* v. *Terrell, Governor, 121 Ga., 368,* the Court, speaking unanimously through Mr. Justice Lamar, said: in the 3rd headnote:

"It is universally held that a defendant in a felony case cannot be arraigned or plead in his absence."

In *Bagwell* v. *State, 129 Ga. 170,* the first headnote of a unanimous decision was:

"In a prosecution for a felony the accused has the right to be present at every stage of the trial; and where the court in such a case, without the consent of the accused and during his enforced absence—he being confined in jail—ordered a mistrial because of the inability of the jury to agree, on a subsequent trial of the same case it was error, requiring a reversal, to strike a plea setting up such unauthorized mistrial and the former jeopardy of the accused."

In *Tiller* v. *State, 96 Ga. 430,* a trial of an indictment for murder, the solicitor general was permitted through the inadvertence of the court to make his argument to the jury during the absence of the accused. Speaking for a unanimous court, Mr. Justice Samuel Lumpkin said:

"The rule that one on trial for a criminal offense is entitled to be personally present at every stage of the proceedings, is too well settled to require argument or the citation of authority. This rule, both in England and in this country, is so well recognized by the standard text-writers and by judicial decisions in an almost unbroken line of cases, that its existence cannot now be seriously called into question. It cannot be doubted

that the argument of counsel is a stage of the proceedings, for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses. When the accused is on bail, and therefore in control of his own movements, he may, by voluntarily absenting himself from the court-room, be deemed to have waived his right to make any objection to the validity of the trial because of his absence. In the case of *Commonwealth* v. *McCarthy*, recently decided by the Supreme Court of Massachusetts, 40 N. E. Rep. 766, it was held that when a person on trial for felony, who was on bail, voluntarily absented himself without leave when the jury retired to consider the case, and remained absent, the verdict rendered in his absence was binding upon him. But Knowlton, J., who delivered the opinion of the court, distinctly stated the general rule we have above announced, and in support thereof cited numerous authorities, which, as already intimated, might be multiplied indefinitely. *The case is altogether different when the accused has not been admitted to bail, but is confined in jail, and therefore in the strictest sense a prisoner whose movements are absolutely controlled by the court.* In the case with which we are now dealing, the accused was such a prisoner. Assuming his right to be present while the solicitor-general was arguing the case to the jury, and the accused being then absent, though the presiding judge was not actually aware of the fact, the real question is: Did the failure of counsel for the accused to call the attention of the court to the fact that the accused was not present constitute a binding waiver by or for him of his undoubted right to be present?"

"It does not appear from the record that the counsel knew of the prisoner's absence; but

granting that he had such knowledge, or is chargeable with it, could his mere silence be held sufficient to constitute such a waiver? We think not. In the case of *Bonner* v. *State, 67 Ga. 510,* this court held that in view of the right of the prisoner in a criminal case to be present in person throughout the trial, it was error for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel were present and kept silent. This case is, in principle, directly applicable to the case at bar, because the argument to the jury was a matter of great importance, and of almost, if not altogether, as much concern to the accused as the charge of the court. We therefore are of the opinion that it was a duty devolving upon the judge himself to see to it that the accused was brought from jail to the court-room before allowing the argument to proceed; and the omission to perform this duty is of sufficient gravity to require the granting of a new trial. We do not mean to say that the duty of seeing that his client was present did not also rest upon the counsel; but his failure in this respect should not relieve the judge of giving the proper attention to this matter, *he being primarily, and above all others, responsible for the regularity and lawfulness of the trial.*"

In the case of *Wade* v. *State, 12 Ga. 25,* Judge Warner said:

"Another ground taken for a new trial, is that the Court erred in calling the Jury from their room after they had retired to consider their verdict, into the Court room, and reading over to them the written testimony as taken down by the Court, without the *consent* of the prisoner's counsel, and while *the prisoner was absent.*'

"This was clearly error. The Court has no more authority under the law, to read over the testimony to the Jury, affecting the life or lib-

erty of the defendant in *his absence,* than it has to examine the witnesses in relation thereto, in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be *present,* and see and hear, *all the proceedings* which are had against him on the trial before the Court. It is said the presumption must be, that the Court read over the testimony correctly, and read over all that was delivered against the defendant; therefore, he was not injured. The answer is, that it was the *legal right* and *privilege of the defendant, to* have been *present in Court* when this proceeding was had before the Jury in relation to the testimony delivered against him; and he is to be considered as standing upon *all his legal rights,* waiving none of them."

In *Hopson* v. *State, 116 Ga. 90,* the Court, speaking through Mr. Justice Samuel Lumpkin, said:

"We are, however, constrained to order a new trial upon another ground of the motion, which complains that, after the court had charged the jury and they had considered the case for some hours, the judge, in the absence of the accused and his counsel, and without any effort to bring them into court, gave to the jury a second charge which was substantially the same as that which had been given before they retired in the first instance. This practice can not be upheld. See *Wade* v. *State, 12 Ga. 25; Martin* v. *State, 51 Ga. 567, Bonner* v. *State, 67 Ga. 510; Wilson* v. *State, 87 Ga. 583; Tiller* v. *State, 96 Ga. 430.* There was no waiver of the right of the accused and his counsel to be present when the second charge was given. It does not appear that both were ignorant of its being given until after the trial had ended; but this makes no difference. It is an inevitable conclusion from the cases cited above that the accused may complain of such an

irregularity after verdict, notwithstanding knowledge thereof by him or his counsel while the trial was in progress. Nor does the fact that the 'recharge' was, in substance, the same as the original charge dispense with the necessity for ordering a new trial. *The great point is that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with law and good practice.*"

In *Martin* v. *State, 51 Ga. 567*, the Court, speaking through Judge Trippe, said:

"It is true the court required the prisoner's counsel to strike from his motion for a new trial the ground that the jury were called back after they had retired, and were again charged by the court in the absence of defendant's counsel. But it still appears from the record that this was the fact, and the reason assigned for striking this ground was that the court understood the solicitor general to say, to-wit: that counsel for defendant had waived everything. Counsel for defendant denied this, and stated what he did waive, which was "the polling of the jury and the reception of the verdict in his absence." There was then a misunderstanding between the counsel for the state and the defendant. Should that mistake or disagreement cause the forfeiture or loss to the defendant of his right to the benefit of counsel during one of the most important portions of his trial, the charge of the court to the jury? The constitutional guaranty that "every person charged with an offense against the law shall have the privilege and benefit of counsel," should be strictly guarded and preserved. So deeply

grafted in our practice has this great right become that none are so low or so poor but that they may rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them, without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary compensation. Nor does the fact that a defendant is thus represented lessen his right to have his counsel present at all stages of his trial."

In *Bonner* v. *State, 67 Ga. 510,* the court, speaking through Chief Justice Jackson, said:

"Without scanning this entire record, we are of the opinion that a new trial must be granted, on the ground that the court erred in recalling the jury and recharging them at their request, in the absence of the defendant, who was at the time in custody and confinement, though his counsel were present, but silent.

"The presence of the prisoner is necessary to his legal trial from the beginning to the end of that trial before the jury. *12 Ga. 25.* And such was the rule and practice at common law. *Wharton's Crim. Plead. and Prac. 540a, 545, 546, 549, 550.*"

In the case of *Wilson* v. *State, 87 Ga. 583,* Chief Justice Bleckley said:

"The sixth ground of the motion for a new trial complains that the court recharged the jury without notifying defendant and in his absence, although his counsel was present. It appears from the record that the judge did not know whether the accused was present in the court-room or not when the recharge was delivered, and that the fact was that he was in an adjoining room in the custody of an officer, not knowing that the jury

was being recharged, and knowledge did not come to him until after the recharge was concluded. Whether his absence from the room was voluntary or by compulsion, we think the court should not have recharged the jury in his absence. He was in the custody of an officer, and whether the officer took him to the adjoining room with or without his consent, it seems to us, made no difference. There is nothing to indicate that it was his intention to be absent when any material step was to be taken in the trial; and before taking such a material step as recharging the jury, we are of opinion that the court should have seen and known that he was present, verifying the fact, if necessary, by ocular demonstration. The presence of the counsel was no substitute for that of the man on trial. Both should have been present. *Bonner* v. *State 67 Ga. 510; Wade* v. *State, 12 Ga. 25; Martin* v. *State, 51 Ga. 567.*

"There was error in not granting a new trial on this ground of the motion."

In *Barton* v. *State, 57 Ga. 653,* the Court, speaking through Chief Justice Jackson, said:

"It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial—especially at the rendition of the verdict, and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. *Nolan* v. *State, 53 Ga. 137; 55 Ib. 521.*"

"The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order."

In *Nolan* v. *State, 53 Ga. 137*, the Court, speaking through Chief Justice Warner, said:

"That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court."

ALABAMA.

State v. Hughes, 2 Ala. 102.
Eliza v. State, 39 Ala. 693.
Waller v. State, 40 Ala. 332.
Slocovitch v. State, 46 Ala. 227.
Cook v. State, 60 Ala. 39, 41, 31 Am. Rep. 31.
Wells v. State, 147 Ala. 140, 41 S. W. 630.

In *State* v. *Hughes, 2 Ala. 102*, the trial of an indictment for murder, the court said in the 1 and 2 headnotes:

"The 10 sec. of the 1 Art. of the Constitution guarantees to one indicted for a crime, the right to be present in Court, that he may discuss questions of law and fact, which may arise either preparatory to, or pending the trial, and that he may point out objections to the action of the jury, or other proceedings in the cause.

"One tried for a crime, has the right to be present when the jury returns their verdict against him, that he may examine them by the poll, to ascertain if they assent to his conviction."

In *Eliza* (*a freedwoman*) v. *State, 39 Ala. 693*, an indictment for grand larceny, the court said:

"(2) In looking into the record of this case, we find a fatal error, which must reverse the judg-

ment below. In the judgment-entry, it does not sufficiently appear that the prisoner was personally present in court when she was tried and sentenced. The entry recites, that 'this day came S. A. M. Wood, solicitor, and the defendant,' &c.; and it also recites, that she 'be taken *hence* to the jail of Tuskaloosa county,' &c. These recitals are not sufficient to make it affirmatively appear that the prisoner was present *in person*, both during the trial, and at the time of the sentence. The rule is well settled, in England, and in this State, and is *inflexible, that a prisoner, accused of felony, must be arraigned in person, and must plead in person; and in all the subsequent proceedings, it is required that he shall appear in person.*".

In *Waller (a freedman)* v. *The State, 40 Ala. 325*, the court said on page 332:

"It was erroneous for the court to allow the jury to return their verdict to the clerk, under the facts of this case. The counsel had no authority to assent thereto, or to waive the right of a prisoner, charged with a felony, *to be present when the jury delivered their verdict to the court. The State* v. *Hughes, 2 Ala. 102; 2 Hawk. ch. 47; 2 Lead. Crim. Cases, 452; Nomague* v. *The People, 1 Breese, 109; 1 Chitty's Crim. Law, 626; 1 Term. R. 434; Prine* v. *Commonwealth, 6 Har. (Pa.) 103; 1 Bish. Cr. Pro. § 688; State* v. *Buckner, 25 Mis. 168; Eliza* v. *The State, 39 Ala. 693.*"

In *Slocovitch* v. *The State, 46 Ala. 227*, the court said in the headnote:

"1. Trial for indictable offense, cannot be had without personal presence of prisoner. No person indicted for a criminal offense, whether it be for a felony or a misdemeanor, can be tried *without being personally present in court*, and a judgment rendered upon a conviction obtained in his absence, if for a fine only, is erroneous, and will be reversed on appeal."

In *Cook* v. *The State 60 Ala. 40*, the court said on page 41:

"It was *not within the authority of prisoner's counsel* to waive for him his right to be present when the verdict was delivered.—*Waller* v. *The State, 40 Ala. 333; Young* v. *The State, 39 Ala. 358; Sperry* v. *Commonwealth, supra; Eliza* v. *The State, 39 Ala. 694.*"

In *Wells* v. *The State, 147 Ala. 140*, the court said in 1, 3 and 5 headnotes:

"1. Criminal Law; Verdict; Rendition; Presence of Accused.—It is essential to the validity of a verdict in all criminal cases that it be rendered in open court, and *in the presence of the accused.*"

"3. Same; Reception of Verdict; Recess.—It is error to permit the clerk of the court to receive the verdict of the jury during the recess of the court, in a felony case, in the absence of accused *even with the consent of his counsel.*"

"5. Same; Waiver; Misdemeanors.—The right to be present when the verdict is rendered, in a misdemeanor case, may be waived by the accused."

ARKANSAS.

Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102.

Cole v. State, 10 Ark. 318.

Sweeden v. State, 19 Ark. 205.

Warren v. State, 19 Ark. 214, 68 Am. Dec. 214.

Brown v. State, 24 Ark. 620.

Osborn v. State, 24 Ark. 629.

Gore v. State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832.

In *Sneed* v. *The State, 5 Ark. 431,* an indictment for larceny, the headnotes were as follows:

"Larceny is, by the common law, a felony; and an indictment for a felony cannot be tried unless the prisoner be *personally present* at the trial. The law is thus careful for the safety of the citizen through the whole trial, from his arraignment to the final disposition of the cause, lest in so important a matter he should be prejudiced."

"The prisoner must also be present when the verdict of the jury is returned."

"Where the prisoner is out on bail the rule is the same; the law not regarding the cause of his absence, as whether he be absent voluntarily or against his will."

"*A verdict taken in the absence of the prisoner is void.*"

In *Cole* v. *The State, 10 Ark. 318,* an indictment for assault with intent to murder, the court said on page 325:

"And the authorities are equally numerous, pointed, and respectable, that, in all cases of treason and felony, the verdict, whatever may be its effect *must be delivered in the presence of the defendant in open Court,* and cannot be either privily given, or promulgated, while he is absent, and if he does not appear the jury must be discharged without rendering it. (*1 Ch. Cr. Law 636, 1 Breese 109. Overton's Tenn. Rep. 435. The People* v. *Perkins, 1 Wend. 91.*) And the defendant's being out on bail does not alter the case. *State* v. *Hulbert, 1 Root 91. Sneed* v. *The State, 5 Ark. 432.*"

In *Sweeden* v. *The State, 19 Ark. 205,* an indictment for assault with intent to murder, the court said in the second headnote:

"On indictments for slight misdemeanors, the accused may be tried without being personally present; but *upon charges amounting to felony,* he must be *personally present in Court during the trial.*"

In *Warren* v. *The State, 19 Ark. 214,* the court said in the first headnote:

"In a criminal prosecution for a slight misdemeanor—as for gaming—a verdict may be rendered and a judgment pronounced, without the defendant being personally present in Court at the time."

In *Brown* v. *The State, 24 Ark. 620,* at 627 the court said:

"The remaining ground relied on for a reversal, is well taken. Upon examination, we find that *the record does not show that the accused was personally present in court,* at the time the *venire facias* for the trial of this case was ordered; and it has been repeatedly decided by this court that, *in prosecutions for felony, the defendant must be personally present at each and every time when any step is taken by the court in his cause,* and that the record must affirmatively show the fact."

In *Osborn* v. *The State, 24 Ark. 629,* at page 635, the court said:

"Referring to the transcript, we find that the defendant was not present when the time for the service of a copy of the indictment was waived, nor was he present when the order for a venire was granted on the motion of the attorney for the state; and therefore he was not legally put upon his arraignment, and that it was error in the court to proceed with the trial, until he was so legally arraigned."

In *Gore* v. *The State, 52 Ark. 285*, the court said:

"Criminal Procedure: Trial for felony: Presence of defendant. 'Section 2213 Mansfield's Digest which provides that if a defendant on trial for a felony, escapes from custody after his trial has commenced, 'or if on bail, shall absent himself during the trial, the trial * * * may progress to a verdict,' is not unconstitutional. The guaranty of the Constitution (Art. 2, Sec. 10) that the defendant shall have the right to be confronted with the witnesses against him, does not include the right to abscond and then complain of his own absence."

"It has been uniformly held by this court that a defendant, charged with felony, has a right to be present at every stage of his trial. Sections 8 and 10 of Article 2 of the Constitution have been construed to guarantee him that right. *And it has been often held that a defendant cannot waive his constitutional rights by agreement.* It is now to be determined whether the constitutional guaranty that the defendant shall be confronted with the witnesses against him remain, where he, pending a trial, absconds and refuses to be confronted. Neither direct authority nor analogy are lacking in the construction of this guaranty."

CALIFORNIA.

People v. Kohler, 5 Cal. 72.
People v. Ebner, 23 Cal. 159.
People v. Beauchamp, 49 Cal. 41.
People v. Higgins, 59 Cal. 357.

In *The People* v. *Kohler, 5 Cal. 72*, indictment for murder, the court said:

"The bill of exceptions shows that after the jury retired, they returned and asked to hear read two depositions of witnesses of the defendant.

The depositions were read to them, and this was done *during the absence of the prisoner.* The rule is familiar that the prisoner, in a case of felony, must be present during the whole of his trial; and reading evidence taken by deposition, although it was done after the jury had retired, is a part of the trial as much as any other. *In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed.*''

In *People* v *Beauchamp, 49 Cal. 41,* the court said in the 2 headnote:

''Receiving verdict in case of Felony.—In a case of felony, the prisoner must be personally present in Court when the verdict is rendered. *If the verdict is received in his absence, it is not valid.*''

In *People* v. *Higgins, 59 Cal. 357,* the court said:

''The defendant, being charged with a felony, was required to be present during the whole of the trial, including the rendition of the verdict. *Without his presence,* no valid verdict or judgment could be given against him.''

COLORADO.

Green v. People, 3 Colo. 68.

Smith v. People, 8 Colo. 457.

In *Green* v. *The People, 3 Colo. 68,* the court said in the headnotes:

''1. Under the statute of Colorado an assault with intent to murder is felony.''

''2. It is error to render a verdict in a charge of felony, the defendant being absent and under confinement in jail; *his right to be present cannot be waived by counsel.*''

In *Smith* v. *People, 8 Colo. 457*, the 1st and 2nd headnotes are as follows:

"1. It is a general rule that the prisoner in a case of felony must be present at every step of the proceedings, or the proceedings will be invalid; except in cases of misdemeanor *the privilege cannot be waived by counsel.*"

"2. If the prisoner is deprived of the privilege of being present when the verdict is returned, the verdict must be set aside and a new trial granted, or the judgment will be reversed."

CONNECTICUT.

State v. Hurlbut, 1 Root 90.

In *State* v. *Hurlbut, 1 Root, 90,* (1784), the report of the case was as follows:

"Information for counterfeiting money; trial to the jury, and the defendant was out upon bail: The jury returned into court with their verdict, and the defendant being called did not appear: The question was, whether the court would receive the verdict. *By the Court*: The defendant must appear, or there will be no propriety in receiving the verdict."

FLORIDA.

Holton v. State, 2 Fla. 500.

Gladden v. State, 12 Fla. 562.

Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247.

In *Holton* v. *the State, 2 Fla. 476,* indictment for murder, the court said on page 500:

"But there was another very important, settled and well established principle of criminal law violated, we think, by this proceeding; which

is, that during the trial of a capital case, (the whole trial,) the prisoner has the right to be, and must be, present—no step can be taken by the court in the trial of the cause in his absence. This results from the humanity of the law, and the tender regard it has for human life; which forbids that any proceedings shall take place in the trial of such a cause, unless the prisoner charged is present in court, to make his objections to any and every step that may be taken in it, which he may deem illegal, and to do whatever else he may or can legally and properly do in his own defence."

In *Gladden* v. *The State, 12 Fla. 562,* the court sand in the 14th headnote:

"14. The prisoner, in a capital case, must be personally present during the whole of the trial, and at every step taken in the cause. He has the right to discuss questions, both of law and of fact, and no step can be taken in his absence."

In *Summeralls* v. *The State, 37 Fla. 162,* the court said on page 164:

"It is well settled by repeated decisions here, as well as in other states, that in cases of felony the accused must be personally present in court during every stage of his trial from its beginning to and including the final passing of sentence. *If it is shown that he was absent during the taking of any essential step in the trial, he can not be said to have had a trial in due course of law.* He has a right to be present in person at the rendition of the verdict in order to exercise the right of polling the jury, and the verdict, in such cases, can not legally be rendered or received during his absence; and it makes no difference whether his absence be voluntary or involuntary."

ILLINOIS.

Holliday v. People, 4 Gilm. (9 Ill.) 111.
Harris v. People, 130 Ill. 457, 22 N. E. 826.

In *Holliday* v. *The People, 4 Gilm. (9 Ill.) 111,* the court said in the last headnote:

"According to the principles of the Common Law, in all capital cases, the verdict must be received in open Court, and in the presence of the prisoner. The rule, however, did not apply to cases of inferior misdemeanor."

In *Harris* v. *The People, 130 Ill. 457,* the court said on page 459:

"It has been a well established rule of the common law from an early period, that a prisoner accused of a felony must be arraigned in person and must plead in person, and his personal appearance is required throughout the trial, and at the time sentence is pronounced. As said *Mr. Chitty*: "Although a defendant accused of a misdemeanor may be found guilty in his absence, this can never be done in capital felonies, but it is necessary that he should personally attend, and it should so appear on the record." 1 Chit. Crim. Law, 414. A leading authority on this question is Rex *v.* Harris, 1 Ld. Raym. 267, Comb. 447, Holt, 399, Skin. 684, in which it was held by Lord Holt, that a judgment can not be given against any man in his absence for a corporal punishment."

KANSAS.

State v. Myrick, 38 Kan. 238.

In *State* v. *Myrick, 38 Kan. 238,* indictment for assault with intent to murder; the court said on page 240:

"His presence is not less necessary or important when the jury are instructed than during the impanelling of the jury, the introduction of evidence, the argument of counsel, or the reception of the verdict. In the present case the defendant was on trial for a felony, and the instructions requested and given were exceedingly important. As the statute forbids the trial of a person for felony, unless such individual be personally present during the trial, the presence of the defendant's counsel and *their consent* to proceeding with the trial in his absence and imprisonment will not cure the illegality. *It has frequently been decided that the right of a defendant in a prosecution for felony to be present is one that cannot be waived by counsel,* and that a reviewing court will not in such cases stop to inquire in regard to the correctness of the instructions given, or steps taken during the absence of the defendant."

KENTUCKY.

Temple v. Commonwealth, (77 Ky.) 14 Bush 769, 29 Am. Rep. 442.

In *Temple* v. *Commonwealth, 14 Bush 769, (77 Ky.) 29 Am. Rep. 442,* which is one of the leading cases on the subject, the court said, in a case of an indictment for murder:

"The bill of rights declares 'That in all criminal prosecutions the accused hath a right to be heard by himself and counsel.' The right exists to be heard by himself and counsel and to have a reasonable opportunity to have his counsel present also at every step in the progress of the trial,

and to deprive him of this right is a violation of that provision of the fundamental law just quoted."

"The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor. And at no time in the whole course of the trial is this right more valuable than at the final step when the jury are to pronounce that decision which is to restore him to the liberty of a citizen, or to consign him to the scaffold or to a felon's cell in the state prison. He has a right not only to see and know that the whole jury is present assenting to the verdict, but by polling to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his."

"The right to poll the jury in criminal causes has in this state always been deemed an essential part of the right of trial by jury. It is guaranteed by both the constitution and the statute, and ought to be maintained and preserved by the courts as essential to the protection of the rights of the citizen."

LOUISIANA.

State v. Ford, 30 La. Ann. 311.
State v. Bradley, 30 La. Ann. 326.
State v. Christian, 30 La. Ann. 367.
State v. Thomas, 128 La. Ann. 813, 55 So. 415.

In *State* v. *Ford, 30 La. 311,* the court said in the 2nd headnote:

"The *presence of the accused,* at the time the verdict against him for a felonious offense is received, *is essential to the validity of the verdict.*"

In State *v.* Christian, 30 La. 367, the court said in the 2nd headnote:

"Where the record in a criminal case fails to show that the accused was present in court, at any time from the moment of his arraignment to his sentence, the judgment and verdict against him will be annulled, and set aside."

In *State* v. *Thomas, 128 La 813,* indictment for murder, the court said in the 1 headnote:

"Not only must the defendant be present at every stage of his trial for a felony, but the record must show his presence or disclose facts that will authorize the presumption that he was present; and a conviction in such case is vitiated when it appears, affirmatively, that the defendant was absent from the court whilst a person, called as juror, was being examined on his *voir dire,* and when he was challenged peremptorily by his (defendant's) counsel." Nor does it affect the question that defendant failed, at the time, to object and except, since "That which the law makes essential, in the deprivation of life and liberty, *cannot be dispensed with or affected by the consent of the accused;* much less, by his mere failure, when on trial and in custody, to object to unauthorized methods."

MASSACHUSETTS.

Commonwealth v. Tobin, 125 Mass. 203.

Commonwealth v. McCarthy, 163 Mass. 458.

In *Commonwealth* v. *Tobin 125 Mass. 203,* indictment for felony, the court said on page 207:

"The law requires the double safeguard against mistake: 1st, the delivery of the verdict by the foreman as the organ of the jury, by word of mouth, in open court, *under the sense of responsibility attending such an utterance in the face of the court and of the public, and, in a case of felony, of the accused;* and 2d, the proclamation by the clerk of that verdict, as understood and recorded by the court. The fact that in this Commonwealth the defendant is not entitled or permitted, as he is in England and in many states, to have the jury polled, makes it peculiarly important for the security of his rights to adhere to the established forms, remembering the words of Chief Justice Shaw, *"In this respect it is true that forms are substance."* *Commonwealth* v. *Roby, 12 Pick. 496, 514, 515.*

In *Commonwealth v. McCarthy, 163 Mass. 458,* the defendant, after being indicted for larceny, was admitted to bail. He was present during all of the trial until after the jury had retired to consider the case, but he voluntarily went away and remained absent until after the jury had returned a verdict against him, which was received and recorded. While it was held that, under these circumstances, the prisoner not being incarcerated and having voluntarily absconded after the submission of the case to the jury, the verdict would not be interfered with, Mr. Justice Knowlton nevertheless recognized the principle for which we contend in the present case. He said:

"It is a general rule, both in England and in this country, that a trial for a felony cannot be had without the personal presence of the accused.

1 Co. Inst. 227 b. 3 Co. Inst. 110. 1 Chit. Crim. Law, (2d ed.) 635, 636. Rex v. Ladsingham, T. Raym. 193; S. C. 2 Keb. 687, and Ventris, 97. 2 Hale P. C. 298-300. 4 Bl. Com. 375. State v. Hurlbut, 1 Root, 90. People v. Perkins, 1 Wend. 91. Sargent v. State, 11 Ohio, 472. Jones v. State, 26 Ohio St. 208. Prine v. Commonwealth, 18 Penn. St. 103. State v. France, 1 Overton, (Tenn.) 434, 436. Harriman v. State, 2 Greene, (Iowa) 270. Cole v. State, 5 English, (Ark.) 318. State v. Hughes, 2 Ala. 102. State v. Battle, 7 Ala. 259. Kelly v. State, 3 Sm. & Marsh, 518. State v. Cross, 27 Mo. 332. People v. Kohler, 5 Cal. 72. The trial is not concluded until the verdict is received and recorded. *Maurer v. People, 43 N. Y. 1,* and cases above cited. In this Commonwealth we have a statute which embodies the same general rule. *Pub. Sts. c. 214, Par. 10.* See *Commonwealth v. Costello, 121 Mass. 371.* Under this statute, as well as at the common law, it may well be held that when a defendant is in custody under an indictment for a felony the verdict cannot properly be taken in his case without his personal presence, even if he has been in attendance in all previous stages of the trial, and that whether he is in custody or on bail the trial cannot properly be begun in his absence. But whether a defendant who is on bail, and who has been present during his trial until the case has been given to the jury, can nullify the whole proceedings by absenting himself until it becomes necessary to discharge the jury, is a very different question. We have seen no well considered case that decides this question in the affirmative. In most of the reported cases the defendant was in custody, and the failure of the authorities to have him present when the verdict was taken deprived him of a right. In others, when the defendant was on bail there was an attempt to convict him without his being present at all; and in two or three others the general rule was applied without discussion to the case of a defendant on bail who had been

present during a part of the trial and was absent when the verdict was rendered. But it has been repeatedly held, upon careful consideration, that while it is a right of the defendant indicted for a felony to be present when the verdict is rendered as well as during the earlier parts of the trial, and while it is irregular and improper to begin the trial in such a case without the presence of the accused, yet if he is on bail and is present at the commencement of the trial, and afterwards voluntarily departs without leave and is absent when the verdict is returned, he may be defaulted and a verdict which will be binding upon him may be taken in his absence. *Fight v. State, 7 Ohio 180. Wilson v. State, 2 Ohio St. 319. Price v. State, 36 Miss. 531. Hill v. State, 17 Wis. 675. State v. Wamire, 16 Ind. 357.* See also *Lynch v. Commonwealth, 88 Penn. St. 189.* Such a case is treated as an exception to the general rule, and as a waiver by the defendant of his right to be present.

The principal object of the general rule above referred to is that the defendant may have an opportunity to exercise his right of challenge, and may avail himself of other rights which cannot be so well exercised, if exercised at all, by his counsel in his absence. Another object is that he may be present at the end of the trial to receive the sentence of the court if found guilty; but under a system like ours, where the prisoner is allowed to give bail and to go at large during the hours that the court is not in session until the end of the trial, and afterwards if there are exceptions, or if there is a motion for a new trial, until these matters are disposed of, it would be unreasonable to hold that he can attend until the case is given to the jury, and, when he sees indications that the verdict is to be against him, can make it impossible to complete the trial, and thus nullify all that has been done by absconding''.

* * * * * * * * * *

MINNESOTA.

State v. Recards, 21 Minn. 47.

In *State* v. *Reckards, 21 Minn. 47*, the court said on page 50:

"Sec. 3, ch. 114, Gen. Stat., provides that even an indictment for misdemeanor may be tried in the absence of the defendant, if he appear by counsel, his personal presence being required only upon his trial for felony."

MISSISSIPPI.

Scaggs v. State, 8 Smed. & M. 722.
Price v. State, 36 Miss. 531, 72 Am. Dec. 195.
Stubbs v. State 49 Miss. 716.
Finch v. State, 53 Miss. 363.
Sherrod v. State, 93 Miss. 774, 47 So. 554, 20 L. R. A. N. S. 509.
Warfield v. State, 96 Miss. 170, 50 So. 561.
Stanley v. State, 97 Miss. 860, 53 So. 497.
Corbin v. State, 99 Miss. 486, 55 So. 43.

In *Scaggs* v. *The State of Mississippi, 8 Smed. & M. 722*, the court said in a headnote:

"In a case of murder, the record must show affirmatively that the accused was present during the trial."

In *Price* v. *The State of Mississippi, 36 Miss. 531* the court said on page 542:

"The general rule is, that the verdict, in cases of felony, must be delivered in open court, and in the presence of the defendant. *1 Chitty Cr. L. 636.* This rule is founded on two reasons: first, the right of the defendant to be present, and to see that the verdict is sanctioned by all the jurors;

and secondly, in order that the defendant, if convicted, may be under the power of the court, and subject to its judgment. The right of the defendant to be present, proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court."

In *Stubbs v. The State 49 Miss. 716*, the court said on page 724:

"The rule that the accused, in cases of felony, must be present in person pending the trial, and that this must be affirmatively shown by the record, as we have seen, is not an open question in this State."

In *Finch* v. *State, 53 Miss. 363*, indictment for grand larceny, the court said on page 365:

"The accused had the right to be present when the verdict was announced, that he might witness the proceeding, and poll the jury. It was erroneous to receive the verdict in his absence. The court had no right to discharge the jury under the circumstances."

In *Sherrod* v. *State, 93 Miss. 774*, the 1st, 2nd and 4th headnotes were as follows:

"1. A defendant on trial for a crime other than a capital felony, who is on bond, may waive the right to be present when a verdict is received; but *in capital cases the accused cannot waive the right*, whether he be in jail or on bond, nor in felony cases not capital where he is in jail."

"2. The right to waive the presence of the accused when the verdict is received is personal, and *cannot be exercised by attorney.*"

"4. That one indicted for murder and on bond was convicted only of manslaughter does not cure error in receiving the verdict in his voluntary absence."

In *Barfield* v. *State, 96 Miss. 170,* the court said:

"The absence of the defendant, on trial for murder, during a part of the time the jury was being impanelled, is fatal error."

In *Stanley* v. *State, 97 Miss. 860, 53 So. 497,* the first headnote was:

"One on trial for murder has a constitutional right to be present during the entire trial, which he cannot waive; and the inadvertent examination of a witness for him in his absence, while confined in jail, requires the entry of a mistrial, and a trial de novo, notwithstanding his silence on the court being advised of the fact."

In *Corbin* v. *State, 99 Miss. 860, 55 So. 43,* the court said in the 3rd headnote:

"One physically unable to attend his trial for a misdemeanor does not voluntarily absent himself and waive the right to be present, guaranteed by Const. §26; and where he is tried in his absence he is deprived of his constitutional right."

MISSOURI.

State v. Buckner, 25 Mo. 172.
State v. Cross, 27 Mo. 332.
State v. Braunschweig, 36 Mo. 397.
State v. Davis, 66 Mo. 684, 27 Am. Rep. 387.
State v. Smith, 90 Mo. 37, 59, Am. Rep. 4.

In *State* v. *Buckner, 25 Mo. 167,* the court said in the 5th headnote:

"5. In the case of an indictment for murder it is error to receive a verdict of the jury in the absence of the defendant. He must be personally present, not only during the trial, but at the time of the rendition of the verdict."

In *State* v. *Cross, 27 Mo. 332,* the court said in the 1st headnote:

"1. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence."

In *State* v. *Braunschweig, 36 Mo. 397,* the court said in the 1st headnote:

"1. In cases of felony, the accused must be personally present at the trial, and no verdict can be entered against him except in his presence."

In *State* v. *Davis, 66 Mo. 684,* the headnote was as follows:

"A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, quaere?"

In the body of the opinion, the court said on page 686:

"The very term waiver imports a voluntary act, and an act cannot be thus denominated when per-

formed under conditions of practical compulsion. If the accused fails to object to an improper proposal coming from the representative of the State, he thereby loses a right guaranteed to him by the law. If he objects, he thereby jeopards his right to an impartial trial by jury, guaranteed to him by the constitution. Under such circumstances, to hold the prisoner bound by an involuntary, so-called, and extorted consent, would be purely farcical, and the merest mockery of justice."

"We do not by the above remarks, intend to be understood as meaning that the accused may not voluntarily, and of his own head, waive any right, short of a constitutional one; but we do mean to assert that such waiver must be one in deed and in truth; in reality, not alone in name and appearance; not made as the result of what is in effect, an intimidatory suggestion of the prosecuting attorney."

In *State* v. *Smith, 90 Mo. 37,* the court said in the 3rd headnote:

"3. Impanelling and examining the jury is a material and substantive step during the trial, within the meaning of the statute, and the defendant cannot waive the requirement to be present when it is taken."

NEBRASKA.

Burley v. State, 1 Neb. 385.

The 3rd and 4th headnotes of the case of *Burley* v. *The State, 1 Neb. 385,* the court said:

"3. The record should also show that the prisoner was present at and during the trial, and at the rendition of the verdict."

"4. *Nor can the prisoner waive his right thus to be present when on trial for a capital felony.*"

NEW JERSEY.

State v. Peacock, 50 N. J. L. 34, 11 Atl. 270.

In *State* v. *Peacock, 50 N. J. L. 34,* it was said in the body of the opinion; the case being an indictment for a felony:

"In felonies, in England, no verdict could be rendered in the absence of the defendant, but in the case of *State* v. *Jackson, 20 Vroom 252,* it was held that by a long course of procedure the practice has become settled in this state to receive the verdict of the jury in all criminal cases, *except capital cases,* without the presence of the accused."

NEW YORK.

People v. Perkins, 1 Wend. 91.

Maurer v. People, 43 N. Y. 1.

One of the leading and earliest cases in this country is *People* v. *Perkins, 1 Wend. 91.* The decision is reported as follows:

"By the Court, Savage, Ch. J. We are of opinion that the verdict was irregular. The prisoner was indicted, and tried, for an offence, formerly called capital. And though many of the ancient forms on trials are now dispensed with, the prisoner should have been present on receiving the verdict, so that he might have availed himself of the right of polling the jury. We advise that the verdict be set aside, and that there be a new trial."

In *Maurer v. People, 43 N. Y. 1,* the headnotes were as follows:

"All instructions or information given by the court to the jury, having a tendency to influence the verdict, are a part of the trial, within the pro-

vision of the statute that no person indicted for felony can be tried, unless he be personally present during such trial."

"Accordingly, where the plaintiff in error having been indicted, and being on his trial for murder, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what has been the evidence on particular points, to which the court replied, giving the information requested, *Held*, that this was a proceeding upon the trial within the statute, and the prisoner not having been present, it was error, for which his conviction must be reversed."

"*Held*, further, that neither the *presence of the prisoner's counsel*, nor his ommission to object, *could waive the illegality.*"

NORTH CAROLINA.

State v. Blackwelder, Phil. L. 38.
State v. Bray, 67 N. C. 283.
State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643.
State v. Paylor, 89 N. C. 539.
State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 643.
State v. Cherry, 154 N. C. 624, 70 S. E. 294.

In the course of the opinion, in the case of *State* v. *Blackwelder, 61 N. C. 38*, the court said:

"The question thus presented is one of very great importance in the trial of capital crime. It is whether the prisoner has a right to be present at the bar at all times during the progress of his trial. We believe that the general impression among the profession in this State is, and always has been, that he has such right; and that the practice has always been in conformity to this impression. The point has never been directly adjudicated, but in the case of *State* v. *Craton, 6 Ire. 104*, the implication in favor of the existence

of the right is so strong that we must regard it as equivalent to a positive decision."

The first headnote in *State* v. *Bray, 67 N. C. 283,* was:

"When a verdict, in a case subjecting a party to punishment in the penitentiary, is rendered out of Court, to a Judge at his chambers, in the absence of the prisoner and his counsel, and is entered on the record on the next day, in the absence of the jury and the prisoner; *Held,* that such verdict cannot be sustained."

State v. *Jenkins, 84 N. C. 812,* is one of the leading cases on this subject. The opinion was rendered by Judge Ruffin. The 2nd headnote was as follows:

"In the prosecution of all felonies, the prisoner has the right to be present throughout the trial; and this right cannot be waived in capital felonies; the prisoner must be *actually* present. Whether the prisoner can waive it, in those not capital—quaere; his counsel cannot."

In the opinion in *State* v. *Paylor, 89 N. C. 539,* it was said:

"In the trial of capital felonies, the rule of practice seems to be uniform in all the states that the prisoner should be present during the whole of the trial; *and in favor of life, this rule is never relaxed.*"

State v. *Kelly, 97 N. C. 404,* involved the trial of an indictment for larceny. We call the court's attention to the fact that the obiter statement in the 3rd headnote is contradicted by the opinion. The headnote referred to was as follows:

"*It seems* that a prisoner in a capital felony can waive his right to be present at all stages of the trial, but his counsel cannot waive it for him."

Speaking of capital felonies, the court said in the opinion itself:

"The rule that he must be so present in capital felonies is in favorem vitae."

In *State* v. *Cherry, 154 N. C. 624,* the court said in the 2nd headnote:

In felonies less than capital and in misdemeanors the defendant has the right to be present at the trial; but this right may be voluntarily waived by him, the limitation being made that in the case of felonies this waiver may not be made by his counsel unless he expressly authorizes them so to do."

OHIO.

Fight vs. State, 7 Ohio 180; s. c. 28 Am. Dec. 626.

Sargent v. State, 11 Ohio 472.

Rose v. State, 20 Ohio 31.

In *Fight v. State, supra,* the prisoner was admitted to bail. After the testimony had been partly heard the court adjourned. The following morning the prisoner did not appear, and a verdict was received in his absence. It was held that, under the circumstances, it was permissible. Mr. Justice Woods differentiated the case from one affecting an incarcerated prisoner. He said:

"A prisoner, in close custody, may be so easily oppressed and deprived of his rights, and it would be so extremely difficult for him to make known

his injuries, and obtain redress, that to prevent unnecessary restraint, and to afford the accused an opportunity of being fully and fairly heard, the rule in reference to him may be reasonable and salutary; * * *. If on bail, I apprehend, neither the courts in Great Britain nor in the United States would proceed to impanel a jury, in a trial for felony, unless the accused were present, to look to his challenges. If the trial, however, is once commenced, and the prisoner in his own wrong leaves the court, abandons his case to the management of counsel, and runs away, I can find no adjudged case to sustain the position, that in England the proceedings would be stayed. Such a case must form an exception to the general rule, and the verdict may be legally received in the absence of the accused. The prisoner cannot be deprived of his right to be present, at all the stages of his trial; but that he must be, under all circumstances, or the proceedings will be erroneous, cannot, we think, be sustained."

In *Sargent* v. *Ohio, 11 Ohio Reports 472,* the 2nd headnote was as follows:

"In criminal cases, the verdict should be received in presence of the prisoner, that he may have the jury polled."

In *Rose* v. *Ohio, 20 Ohio Reports 31,* the court said on page 33;

"Again, an accused person, when a verdict of guilty is returned against him, has a right to have the jury polled. This privilege is never in this State, denied, in a criminal case, although it is a matter of discretion with the court whether it shall or shall not be allowed in a civil case. Of this privilege the accused person is deprived unless present when the verdict is returned. We conceive it to be the right of an accused person to be

present during the trial of his case, and at the return of the verdict, and we think that when deprived of these privileges by being imprisoned in jail, or in any other improper manner, the verdict returned against him should not be followed by judgment or sentence of the court, but a new trial should be ordered if requested."

OKLAHOMA.

Day v. Territory, 2 Okla, 409, 37 Pac. 806.
Leroy v. Territory, 3 Okla, 596, 41 Pac. 612.
Humphrey v. State, 3 Okla, Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972.

In *Day* v. *Territory of Oklahoma, 2 Okla. 409,* the court said on page 412:

"A leading principle that pervades the entire law of criminal precedure is, that after an indictment is found *nothing shall be done in the absence of the prisoner.* While this rule has, at times, in cases of misdemeanor, been somewhat relaxed, yet, in felonies, *it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."* * * *

"From the record, it does not appear affirmatively that the defendant has been afforded his constitutional right of presence during the trial. It may be, and more than likely is true, that the defendant was, in fact, present at all times and that the error is an inadvertence in making up the record when his case was called for consideration; but it would be a dangerous precedent to establish, for the court to assume such to be the truth and thus give its assent to a conviction where the records fail to show that the defendant was actually present on his trial, *thereby saying to the world that the trial of a defendant may take place in this territory, in his absence, in vio-*

lation of a sacred and humane, constitutional, as well as a statutory, immunity.''

In *LeRoy* v. *Territory of Oklahoma, 3 Okla. 596,* the court said in the headnote:

''In a criminal prosecution for a felony the defendant must be actually present at every step in the trial, and in cases where it is necessary the record must show affirmatively the fact of his presence. A case-made cannot be so amended by the trial judge as to contradict the records of the court.''

In *Humphrey* v. *State, 3 Okla. Crim. Rep. 504,* the court said in the 2nd headnote:

''2. In a criminal prosecution for a felony, the defendant must be present, in person, during the trial, and the record must affirmatively show this fact.''

The court said in the opinion on page 507:

''It may appear technical to reverse the case for the failure of the record to show the presence of the defendant, when in all probability the defendant was present at each step taken during the trial. *Courts of last resort must establish precedents under which innocent men are to be tried.* The law presumes every man innocent, and this presumption clings to him until overcome by competent evidence in a fair trial conducted according to law. Even though the evidence in this case is sufficient to warrant the verdict of guilty, yet we must not declare a rule in this case that would deprive an innocent man of any substantial right. It is not the fault of appellate courts when such a precedent must be declared in a case where the proof shows the defendant guilty. The fault, if any there be, is

with the trial court, the clerk, and the prosecuting attorney in their failure to have the record speak the truth."

PENNSYLVANIA.

Dunn v. Com., 6 Pa. St. 384.
Prine v. Com., 18 Pa. St. 103.
Dougherty v. Com., 69 Pa. St. 286.

The 2nd headnote of *Dunn* v. *Commonwealth, 6 Pa. St. 384*, one of the leading cases, was:

"In capital felonies, the record must show that the prisoner was present at the trial, verdict, and passing of the sentence."

The following are extracts from the opinion by Judge Coulter:

"At the rendition of the verdict, the prisoner is entitled to have the jury polled, so that each one shall answer on his own responsibility, *face to face with the prisoner,* as to his guilt or innocence."

"This has been deemed one of the material hedges and safeguards which the common-law forms throw around a person tried for life, and therefore it ought to appear distinctly from the record that he was afforded an opportunity to avail himself of it." * * *

"How easy would it have been for the clerk to enter that "the prisoner being brought into court, and asked, &c., the court proceeded to sentence him to death as follows, &c.;" and how easy is it, in such cases, for the court to see, that, in a matter of life and death, it is so entered."

"We may safely presume, as individuals, in tranquil times, and in an enlightened city, the conduct of the trial was all right; but, as a court,

we can look only to the record, for this record and judgment will be recorded as a precedent for other times; and, if we let in presumptions to supply omissions and defects in records, it will by and by be deemed scarcely necessary to show by the record any of the important safeguards of the trial by jury; and the common-law forms stoutly asserted as a shield of liberty, by the Hampdens, Russels, and Sidneys of other days, will lose their value. *But forms are not merely a shield against the despotism of kings, for there is occasionally a depotism in all countries—a despotism whose terrible voice is heard in tumults and excitements—in the rage of unrestrained and impetuous will, it is then that the stern and inflexible rules of the common-law trial by jury will best prove their importance and value. In the last ten or twenty years there have been mock trials and bloody executions, without the forms of law, in these states a thing which would have been deemed impossible in the primitive days of the republic.*"

"The judgment of this court is, that it does not sufficiently appear by the record that the prisoner was present at the trial, particularly at the rendition of the verdict, nor when sentence of death was passed. Every record of this kind ought to show clearly that the prisoner was tried and sentenced, and is to suffer according to the substantial forms of the law. We cannot say that of this record, and the judgment and sentence is therefore reversed, and the prisoner is discharged."

The case of *Prine v. Commonwealth, 18 Pa. St. 103*, a trial of an indictment for burglary, is a leading case which has probably been more often quoted than any other. The opinion by Chief Justice Gibson is given in full:

"It is undoubtedly error to try a person for felony in his absence, even with his consent. It

would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence. Never has there heretofore been a prisoner tried for a felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment shall not be pronounced against him. These things are matter of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime. How could the Court record them as facts, if the truth were not so? Our looseness in recording forms of procedure, especially in criminal cases—if we have any forms left—has grown till the knowledge of the principles of which they were the exponents, has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction of murder. These irregularities strike our professional neighbors with special wonder. They have overborne resistance by force of numbers; but we have not yielded to them in the one case capital by our law. In conviction of murder, we have required the substantive parts of a proper record to be set out so clearly as to be separable from the dross with which it is usually blended. This was in favorem vitae. In other felonies, it is allowable to presume that everything was rightly done till the contrary appear; but when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for when

a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for *the right of a prisoner to be present at his trial is inherent and inalienable.* The record before us, therefore, is erroneous; but we direct that the prisoners be held to answer a fresh indictment."

SOUTH CAROLINA.

State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877.

In *State* v. *Atkinson, 40 S. C. 363,* the court said on page 368:

"The right of the accused to be present during every stage of his trial for a capital felony has long been settled, and is still fully recognized."

TENNESSEE.

State v. France, 1 Overt. 434.
Andrews v. State, 2 Sneed 550.
Clark v. State, 4 Humph. 254.
Hutchins v. State, 3 Coldw. 95.
Stewart v. State, 7 Coldw. 338.
Percer v. State, 118 Tenn. 765, 103 S. W. 780.

In *State* v. *France, 1 Tenn. 434,* it is said in the 2nd headnote:

"In criminal cases affecting life or liberty, the accused must be at the bar when the verdict is rendered."

The court said in the opinion:

"Per Curiam. The prisoner must be at the bar otherwise the jury cannot be asked for their ver-

dict, and if he does not appear the jury must be discharged without rendering any; and by Overton, J.: In every case affecting life or limb the accused must not only be present when the evidence is given in, but during the trial and on return of the verdict."

In *Andrews* v. *State, 2 Sneed (Tenn.) 550,* the court said on page 552:

"In criminal cases of the grade of felony, where the life or liberty of the accused is in peril, he has the right to be present, and must be present during the trial and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over his person to proceed with the trial or to receive the verdict, or to pronounce the final judgment."

"This rule, founded in the justice and wisdom of the common law, is in substance reiterated in our bill of rights; it is necessary to the full and free exercise of the right of the accused to make his defense; and in case he be legally convicted, that effect may be given on his person, to the judgment of the court."

In *Clark v. The State, 4 Humphreys (Tenn.) 254,* the court said in the headnote:

"In cases of felony and treason the verdict must be delivered in open court in the presence of the prisoner, and, therefore, a verdict rendered, on the trial of a defendant for perjury, in his absence, he having been permitted to go at large during the trial and not having appeared, although called, cannot be sustained."

In *Hutchinson v. The State, 3 Caldwell (Tenn.) 95*, the court said in the headnote:

"Appeal. In felonies, the defendant must give bond to appear before the Supreme Court. A court of error has no jurisdiction to try a defendant for a felony, unless he is present in person."

In *Stewart v. The State, 7 Caldwell (Tenn.) 338*, the court said in the 2nd headnote:

"The absence of a prisoner, (who is found guilty of a felony,) when a jury returns their verdict into court, renders the verdict and judgment against him, void."

In *Percer v. State, 118 Tenn. 765*, the court said in the 3rd and 5th headnotes:

"3. The accused is deprived of his fundamental and constitutional right to be present in court during his trial, where, when the verdict of guilty in a murder trial was announced, he was in a room adjoining the courtroom handcuffed to another prisoner, not in sight of the judge and all the jurors, and the view through the doorway was obstructed by the sheriff standing therein and holding the door open."

"5. The right of the accused to be present in the courtroom when the verdict of guilty is announced in a felony case is so fundamental that it cannot be waived by the failure of his counsel to make objection to the rendition of the verdict until the accused can be present."

TEXAS.

Shipp v. State, 11 Tex. App. 46.

Massey v. State, 31 Tex. Cr. Rep. 371, 20 S. W. 758.

Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117.

In *Shipp v. State, 11 Tex. App. 46*, the 2nd headnote was in part as follows:

"The Code of procedure, article 698, expressly directs that the defendant in a felony case shall be personally present in court on certain occasions, of which one is when the jury return into court for further instructions. *Held*, that in the absence of the defendant his counsel cannot waive his right to be personally present on such occasions, and no waiver can be inferred from the silence of counsel for the defense while instructions are being given to the jury in the defendant's absence, nor from the counsel's excepting to the purport of the instructions."

The case of *Massey v. State, 31 Tex. Cr. Rep. 371*, has already been referred to with extensive quotations.

The 3d headnote of the case of *Hill* v. *State, 54 Tex. Crim. Rep. 646*, was as follows:

"3. Upon trial for murder it was reversible error to permit the reproduction of certain testimony on request of the jury, in the absence of the defendant who was on bail; and this, although his counsel waived defendant's presence and said they would not take any advantage of defendant's absence, and although defendant was voluntarily absent; the first section of the act of the Thirtieth Legislature requiring his personal presence at the trial."

In *Derden* v. *State, 56 Tex. Cr. Rep. 396, 402 S. C. 120 S. W. 485*, the Court said:

"Under the uniform holding of this court we are not permitted to inquire as to how far appellant was injured by being deprived of the right to be present. It is sufficient to say that he had a right

to be present, and that he must be present, when the verdict was received, unless his absence is voluntary or wilful. The statute gives the accused the right to witness the proceedings, to hear the verdict, to poll the jury, and he has, as well the right to inspect such verdict and make any legal objection to it. If we should undertake to sustain the proceedings of the court below on the proposition that no harm was done and that appellant's counsel were able to represent and do all for him that he could himself do, if present, this would be equally available in every case, and would have the effect to absolutely nullify the statute."

VIRGINIA.

Sperry v. Commonwealth, 9 Leigh 623, 33 Am. Dec. 261.

Hooker v. Commonwealth, 13 Watt. 763.

Jackson v. Commonwealth, 19 Gratt. 656.

The 1st headnote of *Sperry* v. *Commonwealth, 9 Lee 623*, was:

"Prisoner accused of felony must be arraigned and plead in person; and in all subsequent proceedings he must appear in person and by attorney."

In *Hooker* v. *Commonwealth, 13 Gratt. 763*, the record failed to show the presence of the defendant throughout the trial. The court said in part:

"It is the right of any one when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses' and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected."

In *Jackson* v. *Commonwealth, 19 Gratt. 656,* the Military Court of Appeals, in 1870 said in the 1st headnote:

"1. Upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside."

WEST VIRGINIA.

State v. Greer, 22 W. Va. 800.

State v. Stevenson, 64 W. Va. 392, 19 L. R. A. N. S. 713.

State v. Sutter, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. 811, 43 L. R. A. N. S. 399.

In *State* v. *Greer, 22 W. Va. 800,* the court said in the 7th and 8th headnotes:

"7. Proceeding in a trial in the absence of the prisoner in a felony case is fatal to the verdict. It is absolutely necessary, that the prisoner shall be present in court, when anything is done in his case in any way affecting his interest."

"8. Where in a murder trial the state proceeded to cross-examine a witness during the absence of the prisoner, the verdict will be set aside, although the court, when the prisoner was present, instructed the jury to disregard the evidence, and the state proceeded to ask the same questions of the witness and received the same answers."

In *State* v. *Stevenson, 64 W. Va. 392,* there was a plea of guilty of murder in the first degree. In order to advise himself the judge proceeded to question the witnesses. The 2nd headnote was as follows:

"2. It is error to the prejudice of the prisoner's legal rights for the court, after receiving the prisoner's plea of guilty of murder in the first degree, and, before pronouncing judgment thereon, to proceed in the absence of the prisoner to examine witnesses and hear from the special judge who presided at the time of receiving such plea statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court or to advise him as to the character of judgment that should be pronounced on said plea."

In *State* v. *Sutter, 71 W. Va. 371,* it was held in the 3d headnote:

"3. Upon a trial for felony after close of the evidence, the judge and the attorneys for both sides go into another room, leaving the accused and the jury in the court room, and in that other room a motion to strike out the evidence of a state witness is made by the accused, and argued, and decided against the accused. On discovery of the absence of the accused, he is sent for, and the judge offers to allow him to again make such motion and argue it, but the accused declines to do so. Such absence of the prisoner demands a new trial."

WISCONSIN.

French v. State, 85 Wisc. 400, 39 Am. St. Rep. 855, 21 L. R. A. 402.

In *French* v. *State, 85 Wisc. 400,* the 3d headnote was:

"3. A conviction of murder cannot be sustained when neither the minutes of the clerk nor the record shows that the prisoner was present in court when the verdict of guilty was rendered,

or that he was present when the sentence was pronounced against him, or immediately before, or that he was asked by the court if he had anything to say why he should not be so sentenced."

COURT OF CLAIMS.

In *Weirman* v. *United States, 36 Court of Claims Rep. 236,* Chief Justice Nott said:

"The petition in this case avers that the defendants were indebted to the claimant for a balance of seaman's wages, and that the money is withheld by reason of the sentence of a naval court-martial. The petition then goes on to state that this court-martial was convened on board the U. S. S. Texas, April 14, 1897, and that the claimant was absent from the court during one day's proceedings. The petition then negatives the condition which would have justified a prisoner's absence from a court-martial by saying that during this day of absence the judge-advocate was present throughout said session, that it was not a secret one, or closed for the purpose of any vote, deliberation, opinion, or sentence. The petition then, probably with intent to put the whole case before the court, concedes that the claimant and his counsel, who was a naval lieutenant, would have been permitted to be present had either applied for leave, and that neither objected to the absence of either, and neither was present; that the assembling of a court-martial on that day was otherwise in conformity to order. The question, therefore, presented is whether the absence of a prisoner or his counsel for one day during the sitting of a court-martial without request to be present or objection to the court's sitting without the presence of the prisoner renders the sentence of the court void.

"The counsel for claimant relies, among other authorities, upon the decision of the Supreme Court of Kentucky in *Allen* v. *The Commonwealth* (86 Ky. R. 643), in which there is a long

array of authorities cited, and in which it is held that 'in cases of felony, the accused has the right to be present, and must be present during the whole of the trial, and until the final judgment;' and upon a case in 55 N. Y. R. 35, where is is held 'that every court is composed of three constitutional parts, the plaintiff, the defendant, and the judicial power to examine the facts, determine the law, and apply the remedy.'

"The claimant also cites the decision of the Supreme Court in *Lewis* v. *United States* (146 U. S. R. 370, 372): 'A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or by his counsel, to waive the right to be personally present during the trial. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his said plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. (*Prine* v. *The Commonwealth, 18 Penn. St. 103, 104, per Gibson, C. J.*) And it appears to be well settled that where the personal presence is necessary in point of law the record must show the fact.'

"Chief Justice Cooley states the rule with characteristic clearness and precision: 'In cases of felony, where the prisoner's life or liberty is in peril, he has *the right* to be present, and must be present, during *the whole* of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment.' (Cooley's Const. Limitations, p. 319.)

"It is manifest that a prisoner in custody is not a free agent, who may walk in or out of court as it may please him. His being in court depends

upon proper authority bringing him there. It cannot, therefore, be said that he waives anything by his absence.

"In a civil court the accused may be out on bail, and, ordinarily, must be represented by counsel, who can watch his interests more effectively than he can himself. If it is desirable or necessary that the prisoner in a civil court be present at every proceeding after indictment, it seems to be still more so that a prisoner before a court-martial should be present, for he ordinarily is not represented by counsel learned in the law and watchful of his interests, but (as in this case) by some naval officer acting from a humane motive. Undoubtedly in the past court-martials have been harsh and arbitrary tribunals. The tendency of modern law has been to restrict their powers and curtail their discretion. This is well summed up by the New York Court of Appeals: 'The power of courts-martial was formerly more extensive than now, and was often exercised in the most arbitrary manner. Blackstone denounced this unlimited power by contrasting it with the certainty and precision of the common law, and expressed his sympathy with those who were subject to their jurisdiction in the following forcible paragraph: 'How much, therefore, it is to be regretted that a set of men whose bravery has so often preserved the liberties of their country should be reduced to a state of servitude in the midst of a nation of freemen.' (3 Blackstone, 416.) The power of these courts has been very much restricted and limited since that period, and it is not strange that some of their more rigorous practices should be also modified in a country making still higher pretensions to freedom.' (*People ex rel. Garling* v. *Van Allen, 55 N. Y. R. 31, '35.*)

"With such an array of authorities this court cannot entertain a doubt concerning the general principle above set forth."

COMMON LAW AUTHORITIES AND TEXT WRITERS.

Coke upon Littleton, 227 b.

"But in criminal cases of life or member, the jury can give no privy verdict, but they must give it openly in court."

2 **Hale's Pleas of the Crown 300.**

"In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given.' Co. Lit. 227 b. Co. P. C. 110."

Dominus Rex. v. Ladsingham, *Sir T. Raym, 193*
(1671.)

"An information was exhibited against Mr. Landsingham of Devonshire, lord of a manor there, for oppressing his tenants, and for several misdemeanors; and upon Not Guilty pleaded, he was found guilty; and Stroud moved to set aside the verdict because unduly given. The information being laid in Devonshire, and the trial there, and yet the jury gave a privy verdict in the county of the city of Exeter which was illegal. 1. To give a privy verdict in a criminal cause, contrary to Coke upon Litt. 227, b. 2. To give the verdict out of the county. But to both these the Court answered thus. To the first. 'Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, *because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time;* but in criminal cases, where the defendant is not to be personally present at the time of the verdict a privy verdict may be given. And as to the second. Custom hath always been to give the verdict in that place; and the court did not think the first point fit to be

moved, because contrary to the record, but however they resolved as before."

4 Blackstone's Commentaries, 360.

"When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms as upon civil causes; *only they cannot, in a criminal case which touches life or member, give a privy verdict. 2 Hal. P. C. 300. 2 Hawk. P. C. 439.*"

1 Chitty Cr. L. 636.

"*Of the verdict.* The verdict whatever may be its effect, must, in all cases of felony and treason be delivered *in the presence of the defendant,* in open court, and cannot be either privily given, or promulgated *while he is absent. Co. Lit. 227, b.;* 3 Inst. 110; *Sir T. Raym. 193; 2 Hale 300; Hawk.* p. 2, c. 47, s. 2; 4 Bla. Com. 360. *Bac. Abr. verdicts, B. Burn, J. Jurors, V. Williams, J. Juries, VII.*"

Bacon's Abridgement, Title "Verdict," page 308.

"It is in one book laid down, that a privy verdict cannot be given in a case of life or member. 1 Inst. 227.

"In two other books it is laid down, that a privy verdict cannot be given in a case of felony; because the jury are directed, and ought, in such case, to look upon the prisoner when they give their verdict."

Raym. 193, Rex v. *Ladsingham; 1 Ventr. 97.*

2 Barbour's Criminal Law 365.

"*Verdict.* The verdict in all cases of felony and treason must be delivered in open court *in the presence of the defendant.*"

Archbold's Crim. Pl. & Ev. 23d Ed., p. 186.

"No trial for felony can be had except *in the presence of the defendant*, and he must, it is said, stand in the dock to be tried."

R. v. *St. George, 9 C. & P. 483.*
R. v. *Douglas, C. & Mar. 193.*
R. v. *Zulueta, 1 C. & K. 215.*

Ibid, p. 214.

"On a trial for treason or felony the jury must deliver their verdict in open court, *in the presence of the defendant.*"

R. v. *Haynes (1900) 64 J. P. 441.*

Abbott's Trial Brief (Criminal Causes) 2d Edition, 718.

"In felony the accused *must be present* when the verdict is rendered, and his counsel cannot waive the right."

Hughes' Criminal Law, §3370.

"*Presence of defendant essential.*—If the prisoner is deprived of the privilege of *being present* when the verdict is returned the verdict must be set aside and a new trial granted, or the judgment will be reversed."

Clark's Criminal Procedure, p. 423.

"In all criminal prosecutions, the defendant has a right *to be present during the entire proceedings*, from arraignment to sentence. *He cannot, according to the weight of authority, waive the privilege in cases of felony*, nor, according to some, but not all, of the authorities, in case of misdemeanor involving corporal punishment."

Wharton's Criminal Pleading and Practice, Eighth Edition, §741.

"*Defendant must be present.* At the time of the rendition of the verdict, as a general rule, the defendant must be present in court, *and in capital cases to take the verdict in his absence is a fatal error.*"

A5.7
[1935
29]
C.7 fL
LF-005-023